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BUSINESS LAW

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PREFACE

Growing recognition of the legal element present in all business is responsible for the increasing attention given to the study of business law in our colleges.

Whether the transaction has to do with the sale of goods, the hiring of an employee, the rendering of services, the hiring or installation of equipment, the borrowing of capital, or even simply the cashing of a check, it must conform to certain legal principles and prescriptions of law. To ignore these is to invite a dispute that may develop into a damage suit. Clear understanding of them makes for surer and speedier operation.

The college study of business law should fix the keystones of the legal structure firmly in the mind of the future business man. Besides an understanding of the legal theory, it should give him an idea of the way the law operates as a matter of practice, and some acquaintance with forms of contracts and other business documents of special legal significance. It should lead him to realize the limitations of his layman's knowledge and the wisdom of using competent legal advice as insurance against trouble. Most important of all, it should so firmly impress him with the importance of the legal element involved in all business relations that in every transaction he will subconsciously have the legal aspect in mind and be able to perceive legal storms when they are still small clouds on the horizon.

This text, originally developed in collaboration with Mr. Thomas Conyngton as co-author, from Mr. Conyngton's earlier treatise addressed to the general business reader, was worked out with these ideas in mind.

As addressed to those preparing for business rather than to lawyers, it interprets legal principles by giving full and non-technical explanations, and by avoiding condensed or abstract

statements or bare enumerations. The principles discussed are applied to practical everyday business situations and illustrated with many typical forms and documents.

To economize the student's time the material has been presented—as regards both the fullness of the entire discussion and the proportion of space given to each topic—in a way to make possible a comprehensive study of the whole subject of business law without requiring a disproportionate share of the school program. For courses to which less than the customary time is allotted, the book can be adapted by omitting the minor subjects, and if necessary, by omitting some of the case problems of the major subjects. The effort has been made also to observe a proper co-ordination with other subjects, and to avoid needless treatment of such details of corporation finance, accounting, banking, credits, etc., as are sufficiently presented elsewhere in the curriculum.

The book combines the deductive and the inductive methods of instruction. It is a text book, and at the same time a modified case book. The unrelieved case method, especially in schools of business administration, is open to certain objections. As the student's time for study is limited, it is difficult for him to give careful study to a long assignment of legal opinions often complicated by technical points. Moreover, lacking the systematic chart of general principles developed by students specializing in law, he may be gravely handicapped in the work of rigid analysis and correlation.

In this volume the necessary background is given in the text, and the text discussion is accompanied with an extensive set of problems—not hypothetical but leading cases of our courts. While these have been somewhat condensed in statement, the facts are set forth with sufficient fullness to provoke full discussion. But—and this is the vital point—the decisions are not stated, and consequently the student must arrive at his own solution, backed up by his own reasoning. This variation of the case method does not restrict the mental processes of the

student to analysis and correlation, but forces him to do constructive thinking.

The decisions of these cases, made up largely of excerpts from the judicial opinions involved, are published in a separate pamphlet available for teachers.

The present volume represents a thorough revision of the text on the basis of five years' classroom use in numerous institutions. The important subjects of negotiable instruments, partnership, and agency have been expanded; case illustrations have been added throughout the text; the forms, to which many additions have been made, have been arranged to synchronize with the text; eighty new case problems have been added; and other modifications have been made, to render the book more teachable. Careful attention has been given, moreover, to the combination of readability of presentation with soundness of content which was so notable a feature of Mr. Conyngton's original work.

Acknowledgment is made to the Coal and Iron National Bank, now the Fidelity Trust Co., and to the Central Railroad of New Jersey, for their courtesy in supplying forms, and to the author's wife, Ethel Cushing Bergh, for untiring help and constant encouragement.

Louis O. Bergh

New York City,
March 16, 1926

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BUSINESS LAW

The Law of the Land

CHAPTER I

EVOLUTION OF LAW

§ 1. **Definition.**—The English word "law" has a variety of meanings. We talk loosely of the law of gravitation, civil law, common law, written law, ecclesiastical law, the laws of health, the laws of God, etc. For the sake of clearness it is necessary in this book to limit the word to those rules of action and conduct which regulate our relations with our fellow-men.

The legal definition of law is "a rule of action prescribed by the supreme authority," and to that is usually added, "commanding that which is right and prohibiting that which is wrong." This last part of the definition must always be qualified by the explanation that the words "right" and "wrong" in this connection are to be construed as *legally right* and *legally wrong*. In rare cases what is legally right may be morally wrong, and at other times what is legally wrong may be morally right.

§ 2. **The Origin of Law.**—It is impossible to imagine any state of society without some law, that is, some "rule of action." A solitary man in an uninhabited country might be said to be without law, but as soon as one other human being came into any relation with him certain rules and customs would grow up to regulate their mutual rights, and these would soon have the form and the force of law. Children

in their play have rules and customs to govern their actions. Among the students of every college there is a curiously complex system of rules and customs, rigidly enforced, which defines the rights and the duties of the different classmen and their relations to others in the college.

A simple people living in a sparsely settled country could get along with a minimum of law, but a highly organized people living in a densely populated country requires many laws.

§ 3. **Law and Liberty.**—Laws are a necessary restriction incident to social existence. Every law and every rule subtracts from the individual's previous liberty of action and circumscribes his freedom. On the other hand, the advantages of social life and achievement are great; therefore the majority of mankind are willing to pay the price, which is submission to law. The trouble comes from the fractious few who, while they enjoy the advantages of living in a civilized community, are not willing to pay the price, and who seek to evade the laws which are obeyed by others and which alone make the civilized community possible.

§ 4. **Sources of Law.**—The beginnings of our legal system go back to the early history of our country when the colonists from England first established courts, and decided the cases that came up according to the principles of the law of England as it existed at that time—that is, they utilized as much as was applicable to conditions prevailing in the colonies. This law was principally the famous "common law" of England that had grown up through the centuries.

Most of the colonies had been established under charters—instruments which served as our written constitutions do now. To the common law were added the enactments of the colonial legislatures that had been established in each colony. The power of these colonial legislatures was limited by the provisions of the charter under which the particular colony existed.

After the Revolution, when the Federal Constitution was adopted, its authority became supreme, and as each state joined the new nation the local governments were shaped according to the basic principles of the Federal Constitution. The common law, the state constitutions and charters, and the enactments of state legislatures, all gave way on any point that conflicted with the Federal Constitution. This subject is treated more fully in the two succeeding chapters.

In order of time the origins of our law may be classified as follows:

1. Common law
2. Colonial charters
3. Laws passed by colonial legislatures
4. Articles of Confederation
5. Constitution of the United States, constitutions of the several states, laws of Congress, laws of state legislatures

In order of authority our existing law may be classified as follows:

1. Constitution of the United States
2. Laws of Congress
3. Constitutions of the states
4. Laws of the state legislatures
5. The common law

Review Questions

1. Give the legal definition of "law."
2. What do you understand by "the supreme authority" in the definition of law?
3. Give two reasons for obeying the law of the land.
4. Does willingness to incur the penalty justify disobedience of the law? What of speeding a motor car?
5. What is the origin of law?
6. What is the effect of an increasing population and an advancing civilization on the volume of law?

7. How do laws limit individual liberty?
8. Give five instances where you have felt the restriction of the law on your freedom of action.
9. Why are we willing to submit to law and lose our freedom to do as we choose?
10. What would be the condition of a community without any law?
11. What is the source of the earliest forms of law in this country?
12. Name in order of time the different origins of law in this country.
13. Name in order of authority the various existing sources of law in this country.
14. What do you understand by an "unconstitutional law"?

CHAPTER II

THE WRITTEN LAW

§ 5. **Definition.**—The technical term "written law" means law that is embodied in constitutions and in acts of Congress, of state legislatures, and of other bodies with legislative authority. In many countries all the governing law is this so-called "written law." Napoleon, who had a better title to fame in the code of laws to which his name is attached than in all his conquests, called together the persons most learned in law to reduce into one orderly compact body all the varying laws at that time prevailing in France. The "Code Napoleon" which was the result has from that time to the present day been the major law of France and is what we call "written law." No similar codification of all existing laws has ever been attempted in the United States, and our so-called "written law" is only a part of the body of law by which we are governed.

§ 6. **Constitutional Government.**—Nevertheless in our country the written constitution is the basis of all law. This is true of the United States as a whole and also of each separate state. A written constitution is the fundamental law on which all other laws are based and to which they are all subject. A constitution has been explained as that written instrument which defines the powers of government and limits the exercise of those powers for the protection of individual rights. The power of Congress is derived from the Constitution of the United States. Congress can pass no laws but such as the Constitution authorizes expressly or by clear implication. Each state legislature has only the power granted by the state constitution.

§ 7. **The United States Constitution.**—The Constitution of the United States is the highest authority in the United States. Any federal or state law that contravenes it may be declared unconstitutional and invalid by the courts.

§ 8. **Laws of Congress.**—Next in rank to the United States Constitution come laws enacted by Congress in pursuance of the powers enumerated in the Constitution. The legislative power of Congress, as noted above, is limited to specific objects enumerated in the Constitution. For example, Congress has the power to "regulate commerce with foreign nations and among the several states and with Indian Tribes." By virtue of this clause it has passed the Interstate Commerce Commission Act, the Anti-Trust Law, The Trade Commission Act, and other important legislation relevant to commerce "among the states," i.e., interstate commerce. On the other hand, it has no legislative power in regard to intrastate commerce, i.e., commerce entirely within one state.

Whenever Congress acts under a constitutional grant of power, the states are excluded from legislation on that subject. For instance, Congress has power to pass "uniform laws on the subject of bankruptcy," and when the present bankruptcy law was passed in 1898 it at once nullified all the existing state laws on the subject of insolvency. Laws passed by Congress *in pursuance of* its constitutional powers are superior to state constitutions and state laws.

§ 9. **State Constitutions.**—At the time of the adoption of the National Constitution, each of the thirteen original states was exercising the powers of government under some form of written constitution. These instruments remained in effect, except in those particulars which were overruled by the Constitution of the United States. The newer states adopted constitutions, and before the states were admitted it was necessary for Congress to accept their constitutions. But within the limits of each particular state the state constitution is su-

preme. The state legislature cannot enact a law which goes counter to any of the provisions of the state constitution.

§ 10. **Legislative Enactments.**—Next in dignity and authority to the state constitutions come the laws or acts of the separate state legislatures, so far as they conform to the Constitution of the United States and the constitution of the particular state. Below state laws in dignity come the ordinances or laws of boards of aldermen and common councils in towns and cities. The law from all of these different sources—constitutions, laws of Congress, laws of legislatures, and ordinances of municipal governments—may be said to make up the body of what is called the "written law," in contradistinction to what we call the "unwritten law" which is discussed in the next chapter.

§ 11. **Subsidiary Laws.**—In late years there has come into existence an immense additional body of written law consisting of the rules and regulations issued by boards of health, building boards, school authorities, and various bureaus and commissions. For instance, the Interstate Commerce Commission is empowered by Congress under the Federal Constitution to regulate certain specific matters. Moreover, the different transportation companies and the other corporations operating public utilities have the right to make reasonable regulations for controlling the conduct of those using their facilities. Thus, in the aggregate, the "written" or "statutory" law comprises a vast number of legal and semi-legal enactments, from articles of the Constitution down to the rules of the trustees of the smallest school district.

Review Questions

1. What is the characteristic feature of written law?
2. What do you understand by a "constitutional government"?
3. Does a constitution have to be written?
4. Why does not New York City have a constitution?

5. Why does the state of New York have a constitution?
6. Why is it difficult to discard an existing constitution?
7. What is the highest source of law in the United States?
8. Where does Congress get its powers to make law?
9. Why could not Congress pass a law to regulate the open season for deer in the state of Maine?
10. Name some congressional laws passed within recent years.
11. What is the effect of a state constitution?
12. What laws are superior to a state constitution?
13. Name some laws passed by the legislature of your own state.
14. What other local laws of less dignity are found in your state?
15. Is it necessary to have as many sources of law as we have? Give a reason for your answer.
16. At the time of the Revolution did they have so many laws as we have now?
17. Will there be more or fewer laws fifty years from now? Give a reason for your answer.

CHAPTER III

THE UNWRITTEN LAW

§ 12. Definition.—To the layman, perhaps, the term "unwritten law" is somewhat misleading. It is called unwritten law because there was a time when it was not written. As soon as men commenced to live in communities they found it necessary to conduct their intercourse and dealings according to rules, and these customs or uniform methods of doing things are supposed to be the foundation of what is now called the "common" or "unwritten law." For instance, when vehicles meet it is the custom in this country to turn to the right. This custom is not the enactment of any legislature, and yet it is practically a law, for if anyone driving a vehicle failed to observe it he would be liable for any damage that resulted in consequence. It might be possible to find cases where this particular matter had come up and received the ratification of a court decision, but in such cases the court did not make either the custom or the law; it merely recognized that the custom was general and hence had the force of law. That is, the court recognizes the custom as law because men have acted in one way until that way has become a rule of action; the court is bound by it although there is no written record. When so recognized by a court, it would be placed upon the court records and so would actually be *written down,* yet it is still called "unwritten law" because it is based on the earlier unwritten custom instead of upon legislative enactment. Lawyers distinguish these classes as *lex scripta* (written law) and *lex non scripta* (unwritten law).

§ 13. The Doctrine of Precedents.—The courts do more than record customs; they create law by decisions that then

become precedents. In primitive days when men had differences of opinion they would get someone older and supposedly wiser than the rest, to arbitrate or decide the matter. When a given matter had once been decided in a certain way, the inhabitants of the country would shape their conduct according to this decision; it would be a precedent for future action and future decisions and in this way would become part of the unwritten law. Gradually, as civilization increased and these precedents accumulated, a body of unwritten law grew up, founded partly on customs and partly on precedents established by the courts.

Moreover, if a question came before one of these early courts and no custom could be found on which to base the decision and no precedent to guide it, the judge would decide according to his ideas of right and justice and thus would add a new item to the sum of this unwritten law, which in turn would become a precedent for later cases like it. England has been eulogized by its poet laureate as:

> A land of settled government,
> A land of old and fair renown,
> Where Freedom broadens slowly down,
> From precedent to precedent.

§ 14. Court Reports.—In the old days when writing was a rare accomplishment, individual lawyers used to make their own notes of cases in what were called "Common-Place Books," which they would use as authorities when similar cases were tried. In this way there grew up the custom of making court reports. Today the decisions of the courts are most carefully recorded and published, and the court reports are the greatest repositories of this so-called "unwritten law."

§ 15. The Volumes of Reports.—The difficulty in our country at the present time is that we have over forty-eight different and independent systems of courts, all grinding out decisions, which are recorded and published in long rows of

volumes. In the first place the number of reports has become so great that it is impossible for even the most industrious lawyer to keep up with them. The existing law reports of this country fill thousands of volumes, and every year they are growing in number and complexity. In the second place, there are forty-eight separate jurisdictions: the decisions do not always harmonize, and then occurs a conflict of laws.

§ 16. The Common Law.—This unwritten law was also called, as has been said, the "common law," and old-school lawyers were fond of extolling it as the perfection of human wisdom. When this country broke away from England at the time of the Revolution we retained the English common law, and it became the foundation of the general system of law prevailing throughout most of this country. In Louisiana, however, and to a certain extent in Texas and California, the so-called Roman or "civil law" was introduced and became largely the foundation for the systems of law in those states. This system, based on the old Roman law, prevails in Italy, France, and other Latin countries in Europe and is utilized by the Teutonic peoples as well.

The term "unwritten law" covers a wider field than "common law." Therefore it is used in this work to designate the law that is contained in the reports of the courts.

Review Questions

1. Mention some instance where a custom has become a law.
2. When a custom is recognized by a court, and its decision is recorded, what is the effect?
3. Is it better for courts to decide cases on precedents, or to decide each case as it comes up on its merits? Give reasons for answer.
4. What are court reports? What is a court decision?
5. Why is there such a multiplicity of reports?
6. How do legislatures set aside judicial precedents?
7. Where do we get our common law?
8. What country's laws are most nearly equivalent to ours?

CHAPTER IV

LAW AND EQUITY

§ 17. **Remedial Law.**—When anyone has suffered a wrong and his legal rights have been infringed, he seeks a remedy. The law itself may be ideal, but if the machinery to enforce the rights defined by the law be defective, abstract perfection will avail but little. Therefore a study of what is called remedial law is necessary before we can tell what real help we are likely to obtain from the law. The "law's delay" is proverbial. In all matters of judicial procedure there has always been a tendency to formality and "red tape." Too often this tendency becomes so excessive that it nullifies the remedy and results in a denial of justice. The remedy may be so costly and long deferred that it were better left unsought. The man with limited means is too often, on this account, barred from seeking justice.

Suits or actions to redress wrongs or to enforce rights are classified as suits at law and suits in equity. It is not easy to explain briefly the distinction between "law" and "equity" as they are used in our administration of justice. The two words are used in this connection without any reference to the ordinary meaning attached to them. A real, technical distinction exists between a case at law and a case in equity which a lawyer must thoroughly understand. Whether it would pay a business man to study the exact and full distinction between the two is doubtful. But, as it is impossible for a lawyer to avoid using the terms in their technical sense, it is important that the layman should have a general idea of what the lawyer means, so that the plain man may not be misled by confusing the ordinary English use of the words with the legal signification.

§ 18. **Equity in the Legal Sense.**—In England, by the sixteenth century, the proceedings at law had become so cumbersome and so limited in scope that it was difficult to obtain justice in the courts of common law. To correct this it was provided that in those cases in which the common law did not afford a remedy, relief could be obtained by applying directly to his chancellor. This official, who was also a dignitary of the church, favored the Roman or civil law and adopted a procedure founded on that law in contradistinction to the common law. Such a procedure before the chancellor was called a suit in "chancery" or "equity," as distinguished from the procedure "at common law" or simply "at law." It should be noted, however, that while at first it was simpler to bring a suit in equity than at law, this distinction soon vanished and equity proceedings became even more complex and technical than the procedure at law. The chancellor, however, gave relief in many cases for which the common law gave no remedy. The common law was adapted to a simple life and a crude social system. As the English people advanced the deficiencies of the common law were manifest and the introduction of courts of equity was a long step in legal reform. The two distinct systems both continued, the procedure was different, the rules were different, and the relief given was different.

In equity the remedies are different from those provided by a suit at law. To illustrate the difference: If anyone breaks down your fences and makes a road across your property, at *law* you can sue for damages; in *equity* you can ask an injunction restraining the offender from further trespass.

§ 19. **Suits at Law and in Equity.**—The distinction between law and equity was brought to this country and still survives so that today we have this division of the work of the courts and the two methods of bringing suit. In a few states the law and equity courts are kept entirely separate, as is the case

in New Jersey; and in these states the public realizes more readily the real difference between law and equity administration. But in most states today, the actions are brought in the same courts, the only difference being in the preliminary procedure, the remedies which the courts grant, and in the fact that in most cases at law there is a jury trial, while in equity cases a judge or judges alone hear the case.

§ 20. Bringing a Suit at Law.—When A refuses to pay a debt that is due, or fails to do what he has contracted to do, or by his negligence or wrong-doing has caused damage to B, if B wishes to bring suit against A he employs a lawyer who prepares a written statement setting forth his client's cause of action. This paper is called a "complaint" and must be served upon A. At the same time with or before the service of the complaint, B must serve a notice or summons on A requiring him to answer within a certain number of days. If A does not appear, the court will consider that A does not mean to defend and, usually, if the claim is definite, will grant a judgment by default against A and in favor of B, without a trial or anything more than a sworn complaint to prove the case. If the claim is indefinite, there will be a one-sided trial, in which B will have to present his evidence perfunctorily, but he will not be cross-examined or contradicted by opposing witnesses.

The party bringing the action is called the "plaintiff," in some states the "complainant." The party against whom the action is brought is called the "defendant." The written papers by which the parties bring their cause before the court are called "pleadings." If the defendant does not wish to allow judgment to go against him by default, he or his lawyer must within the time set serve an answer to the other party's complaint upon him. In this paper the defendant may bring forward any cause of action which he may have against

the other party. This is called a "counterclaim." If the defendant denies the facts alleged or sets up a counterclaim, the pleading is called an "answer."

If what has been stated in the complaint does not make a legal cause of action, the defendant through his lawyer may object to it by filing a demurrer. A demurrer objects to the complaint on legal grounds; for example, that it is not brought in the right court, or that the facts alleged, even if true, do not constitute a cause of action.

Then the matter of the demurrer comes up before the court. It is argued by the lawyers on each side, and if the court decides that the demurrer presented by the defendant is well taken, the complaint is dismissed. The plaintiff can then usually get leave (by paying the costs up to date) to file a new complaint in which his lawyer will try to avoid the particular legal difficulty.

If the court decides, however, that the demurrer is not well taken, it is dismissed, and this leaves the defendant to answer the complaint as to the facts, that is, as to the matters which have been alleged on the part of the plaintiff and denied on the part of the defendant.

§ 21. **Trial at Law.**—When the parties have finally *come to an issue,* i.e., when the plaintiff has alleged certain things and the defendant has denied them or has interposed a defense, then the case is set down for trial, and takes its place on the court calendar. When the cases that are ahead of it on the calendar have been tried, or postponed, the case is called and the lawyers on each side are asked if they are ready. When both sides are ready, or have no excuse for longer delay, a jury is assembled and the judge proceeds with the case. In a court of law a party has a right to have a jury decide any disputed facts.

The witnesses for each side are sworn and testify; then

the case is argued by counsel for each party and goes to a jury to decide or is decided by the judge, or is taken under advisement by the judge, who will give his decision after due consideration. If the case goes to a jury, the jurymen are placed in the custody of a court officer until they reach a decision or find that they cannot agree. If the judge is to decide the case and takes it under advisement, it may be days, weeks, or months before he will render his decision.

Since a jury is composed of human beings, it is likely to show certain very human characteristics in its decisions. The sympathies of the jury are usually with the under dog, whether he is plaintiff or defendant. Often the plaintiff, by the mere fact of going to court with his troubles and then by being heard *first,* has the better chance. If one party is a corporation, the jury is inclined to regard it as a soulless oppressor, and to award damages in favor of the poor workingman, widow, etc., whom the corporation is supposed to have injured.

Very frequently clever and unscrupulous lawyers get in some touch to appeal to the sympathies of the jury, as a photograph of an injured man's wife and children, etc. These are usually ruled out by the court, but the effect on the jury has been gained just the same. It is to be remembered that if one man on the jury is stubborn, prejudiced, or dishonest, he can prevent a verdict and the whole expense and trouble of the trial has to be repeated. The law frequently breaks down in vindicating rights because of the imperfect workings of the jury system.

§ 22. **Bringing a Suit in Equity.**—The outline given applies to a court of law. If the court is a court of equity jurisdiction, the procedure is essentially the same except that the first statement may be called a petition or a bill in equity. In New York, complaints are also used in equity. All court procedure

follows the general lines explained in this chapter, but with many variations as to details and incidentals.

In a suit in equity, only a judge, or several judges, hear the case. For this reason a court of equity is not so strict about keeping out evidence that does not properly have anything to do with the case, or that might prejudice a jury. The judge is supposed to know the law and to be guided only by such evidence as ought to be allowed to affect the decision of the case. Aside from this, the practice in equity is just as complicated as that at law.

A court of equity tries to give a remedy to fit the nature of the wrong that is being done. If the wrong consists in a refusal to perform a contract, the court will, in some instances where the contract should be performed, compel the offending party to carry out his agreement. (See Chapter XV.) If the wrong alleged consists in the defendant's continuing to do anything which is injuring another, the court will issue what is called an injunction forbidding the continuance of the injurious conduct. Practically speaking, however, the courts are chary of granting an injunction and will not grant it where other relief is available.

It is useless to attempt to bring an action in equity unless the party is certain that he can prove to the court that the damages which he can obtain at law will not compensate him for his injury, and unless he is willing to do everything which the court may require from him in the interests of justice. The maxim is that he who seeks equity must do equity.

Another maxim in equity is that he who comes into a court of equity must come with clean hands, i.e., if the complainant alleges fraud, he must show that he has been scrupulously fair in all his own dealings.

If the party resorts to equity when he should have instituted an action at law, he will merely find that he is obliged to go to the expense of bringing another action at law.

§ 23. **Appeals to a Higher Court.**—The decision of a trial may be appealed from by the dissatisfied party.

The most common grounds of appeal are the following:

1. That evidence was admitted which should have been shut out.
2. That evidence was rejected which should have been admitted.
3. That questions were allowed which should have been barred.
4. That questions were disallowed which should have been allowed.
5. That the judge charged the jury in a way he should not have charged it.
6. That the judge refused to charge the jury as requested and as he should have charged it.
7. That the verdict was excessive or inadequate or not supported by the evidence.

The appeal is a costly and complicated proceeding. All of the papers and much, in some cases all, of the evidence must be printed. Then the arguments, ironically termed "briefs," of each of the opposing counsels, are printed. After more delay and often much sparring of counsel over points of procedure, the case will take its place on an appeal docket and in due course will be reached by the appellate court. Next the case is heard, which means that counsel for both sides appear and argue the case on appeal. Finally the court takes it under consideration and if a new trial is granted it must be tried again in the original court.

Suggestions for Students

Each student is advised to attend the trial of a civil case before a judge and jury in his vicinity.

Note the whole procedure from the time the case is called until the decision is rendered. Such a suit is typical of all Anglo-Saxon courts. Note the function of the judge, the jury, the counsel, the con-

stable, marshal, or other officer of the court. Note how witnesses are called, sworn, examined, and cross-examined. Note the arguments of counsel, and how they impress you. Then answer these questions.

1. After hearing the witnesses, how would you have decided the case?

2. After hearing the lawyers argue, would you have decided otherwise?

3. Do you think the actual decision was just? Give reasons.

4. Allowing fair rates of payment for men of the ability engaged in the trial, and for the time of the judge, marshal, parties, lawyers, and witnesses, how much did the trial cost the community? What was the amount involved in the litigation? Was the suit so witnessed a fair average as to time, number in attendance, etc?

5. Could you devise any better system of settling disagreements between men?

Review Questions

1. Does punishing a thief help the man who has been robbed?
2. If a man has been defrauded what relief should the law give? What hinders this relief?
3. What was your idea of the technical distinction between "law" and "equity" before reading this chapter? What is it now?
4. What was the origin of the distinction between courts of equity and courts of law?
5. Why does not this distinction exist in countries other than those speaking English?
6. What is "procedure" and what is "remedy," as the words are used by lawyers?
7. What are the most obvious differences between legal and equitable practice in this country?
8. What is the difference between a civil and a criminal case?
9. When will an injunction be granted? Is it a legal or an equitable remedy?
10. Outline the procedure in bringing a suit at law.
11. Define "complaint," "answer," and "demurrer."
12. What is meant by "being at issue"?
13. When has a party a right to a jury?
14. Does the majority rule in a jury?
15. Why are the verdicts of juries liable to be unsatisfactory?
16. Why should a lawsuit be avoided if possible?

17. When is a suit in equity brought?
18. Can either party have a jury trial?
19. What does "He who seeks equity must do equity," mean?
20. Mention some circumstances that entitle a defeated litigant to appeal.
21. Why are appeals costly?
22. Why do corporations and wealthy people have an advantage in litigation?

CHAPTER V

CRIMINAL LAW

§ 24. **Criminal Procedure.**—Criminal law is administered in a manner different from the usual procedure at law and in equity. The state prosecutes for crime, and, while the accused person is called the defendant, there is no plaintiff save the state. The designation of a criminal case might be: "State of Ohio *v.* John Doe (name of accused)." In the different states there is more or less variation in the administration of criminal law.

Criminal prosecutions are usually instituted by a warrant sworn to by the aggrieved party before a magistrate. The magistrate then summons the accused person to appear or issues a warrant for his arrest. In minor cases the magistrate tries the person, or in some instances the accused may demand a trial by jury. Where the offense is serious, the magistrate has only jurisdiction to commit the accused to await the action of the grand jury. In most cases the accused person is allowed to give bail for his appearance when the grand jury meets.

Serious crimes must always be prosecuted by indictment, i.e., a written accusation authorized by a grand jury. The grand jury consists of twenty-three men and is convened from time to time in each county to investigate any charges of crime that may be brought before it. Proceedings before a grand jury are, of course, *ex parte,* i.e., only one side is heard; although the defendant may tell his story, if he requests permission and this is granted by the grand jury. These proceedings are under the supervision of the legal representative of the state, the prosecuting attorney. The object of the grand jury investigation is to ascertain what persons should be tried

before a trial jury and whether the evidence against people accused of crime is sufficient to justify the state in prosecuting them. If an indictment is found and the person has not been arrested, the authorities try to arrest him. The names of all who are indicted are placed on a criminal docket to await trial before a trial jury. The grand jury system is painfully cumbrous, and has been abolished in some states.

§ 25. **Classes of Illegal Actions.**—Offenses against the criminal law are divided into two classes: felonies and misdemeanors, according to the degree of the offense.

A felony is a grave offense, punishable by heavy penalties. A misdemeanor is a lighter breach of the law and is punishable by lesser penalties.

Burglary—the breaking into a house to steal or to commit some other crime therein—is a felony and is punished by confinement in a penitentiary. Driving an automobile too fast is a misdemeanor and may be punished by a fine or confinement in the county jail.

§ 26. **Penalties.**—The penalties for violation of the criminal law are fines, imprisonment, and, for a few offenses, death. In this country the Constitution of the United States prohibits banishment and forbids cruel and unusual punishments.

Review Questions

1. Why does the state act as plaintiff in criminal cases?
2. Outline the usual criminal procedure.
3. What is the most obvious defect of our criminal procedure?
4. What can be done to improve criminal procedure?
5. What is the difference between a felon and a misdemeanor? Give an example of each.
6. How is the criminal law enforced?
7. What *is* the primary object of legal penalties for crime: (1) justice, (2) prevention of crime, or (3) the reformation of the criminal? What *should be* the object?

Contracts

CHAPTER VI

ESSENTIAL FEATURES OF A CONTRACT

§ 27. Agreements and Contracts.—Civilized life may be said to be founded on agreements. The savage, roaming at will and getting his sustenance as he goes, is a complete individualist and has no need of agreements. But in organized society our whole social and business life is based on understandings with those with whom we come in contact. In fact the interrelationships are so varied and complex that the whole social fabric depends upon the making and observance of countless agreements. The law of contracts may well be called the cement of society.

Whenever an agreement is of such a nature that it may be enforced in a court of law, it is called a contract. The subject of contracts occupies a predominant position in the whole field of law, because it is the foundation of many other branches of law. Contracts, far more than other branches of law, regulate the daily life of the individual. Every time we buy or sell merchandise, securities, or property of any kind, ship goods, take out insurance, hire an employee or become one, we make a contract. In fact, the entire business of our industries, railroads, and banks is based on contracts, for every business relation is either itself a contract or else the result of a contract.

§ 28. Definition of Contract.—A contract is defined as an agreement enforceable in court between two or more parties, for a sufficient consideration, to do or not to do some specified thing or things.

It is an agreement; and the minds of the parties, to use

the technical phrase, "must meet." This meeting of the minds means that the parties must agree on all the terms of the agreement. Every agreement is not a contract. To be a contract, the agreement must "be enforceable in the courts." The parties must have intended it to be binding legally. Obviously a mere social engagement, such as an agreement to spend a vacation with a friend, is not a contract. In short, the agreement must affect the legal relations of the parties.

There must be at least two parties to the contract, for a man cannot make a contract with himself. This is true, even though one acts in different capacities. An executor of an estate cannot as an individual sell his personal property to himself as executor. To this minimum requirement, i.e., that there be two distinct parties, there is no corresponding maximum; we may have three, four, or a hundred or more parties. Furthermore, the parties must be legally competent to make a contract. This word "parties" has an additional technical meaning. The terms "the parties of the first part" and "the parties of the second part," which we often see in written contracts, refer to persons who are grouped together as having the same rights and liabilities in the contract.

Moreover, there must be a consideration, without which there can be no legal obligation. If a man agrees to do something, there must be a valid reason or inducement for him to bind himself. This, in legal parlance, is the consideration. If the promise were gratuitous, that is, if there were no inducement for the promise, the promisor might be morally, but he would not be legally, bound to carry it out. A naked promise, without consideration, cannot be enforced in a court of law.

There must be, also, the obligation, or thing to be done. This may be to pay money, to do work, or to deliver goods; or it may be to refrain from doing something which the person contracting had a right to do.

§ 29. **Essential Features.**—Thus an agreement to be legally enforceable as a contract, must have the following essentials:

1. The parties must agree to the same thing.
2. The parties to the agreement must be legally competent to contract.
3. There must be a sufficient consideration.
4. The agreement must be to do something lawful.

§ 30. **Simple Contract.**—The following is an example of a simple written contract:

This agreement is made this 22nd day of December, 1925, between William Morgan and John Robertson, both of Albion, Indiana.

William Morgan undertakes to construct a line fence between his pasture and the pasture of John Robertson. The fence is to be about forty rods long, made of barbed wire, six wires high, fastened on black locust posts set firmly in the ground every eight feet.

When the fence is completed John Robertson is to pay to William Morgan one-half of the cost of the materials and labor plus ten per cent. In addition, William Morgan is to receive the material from the old fence now between the pastures.

WILLIAM MORGAN
JOHN ROBERTSON

Review Questions

1. Explain the importance of the subject of contracts.
2. What contracts have you made within the last month? What did you do or give in each? What did the other parties do or give?
3. Give the definition of a contract.
4. What is meant by the term "the meeting of the minds"?
5. Give an example of an agreement which could not be the basis of a contract.
6. How many parties are required to make a contract?
7. Why must there be a consideration for a contract?
8. Give the four essential elements of a contract.

CHAPTER VII

AGREEMENT OF THE PARTIES

§ 31. Mutual Assent.—As noted in Chapter VI, the parties to a contract must agree on all the terms. This agreement results usually from an offer made by one party which is accepted by the other. The offer or proposal may be oral or written, as may the acceptance, except in certain special cases when writing is required. The simplest form of contract is an offer to sell goods at a specified price and an acceptance of the goods at that price. If this offer is made by letter and the acceptance is made by letter, the two letters taken together constitute a complete contract of sale.

Here is an illustration of a contract formed by an interchange of letters:

Trenton, New Jersey,
December 17, 1925.

TRUSTEES OF TRENTON CHORAL SOCIETY,
211 Greensward Street,
Trenton, New Jersey.

GENTLEMEN:

In answer to your inquiry, we can let you have the use of the Main Hall in our building, 484 Main Street, for two nights, January 21 and 22, 1926, for the concerts of your Society, including light and heat, for seventy-five dollars a night, or one hundred and fifty dollars for the two nights. It is understood that this contract is with you three gentlemen personally and that you individually agree to pay the specified rent.

Yours very truly,
HAYES & MARCUS

MESSRS. HAYES & MARCUS,
484 Main Street,
Trenton, New Jersey.

Trenton, N. J.,
December 19, 1925.

GENTLEMEN:

In reply to your letter of the 17th, would say that your proposition is accepted and we shall arrange for the concerts January 21 and 22 as specified.

We bind ourselves individually to pay the price named, one hundred and fifty dollars, for the two nights.

Respectfully,
H. J. THOMAS
JOHN E. BAKER
ALFRED DICKSON

It is desirable to have all the points agreed upon clearly stated in the contract. Certain points, however, may be omitted as taken for granted. When nothing is said as to terms, the law implies cash. When nothing is said about delivery, the law implies delivery within a reasonable time.

The party making the offer is the offeror; the party receiving the offer is the offeree.

The contract arises when the offeree accepts the offer.

§ 32. **Acceptance Must Be Unqualified.**—The offer must be accepted in accordance with its terms. The offeree must accept all the terms of the offer, no more, no less. If he adds any qualifications or conditions, his attempted acceptance is nugatory. For instance in Myers *v.* Trescott, 59 Hun (N.Y.) 395, Trescott by letter offered to sell apples to Myers in certain quantities at prices named. Myers accepted, but added in his letter "goods must be prime quality and run two hundred net to the barrel." Trescott refused to deliver and Myers sued for breach of contract. The court decided for Trescott, pointing out that Myers had qualified his acceptance and made it depend "upon facts not contained in the proposal of sale."

The attempted acceptance by Myers was in reality a rejection of the offer and the making of a new or counter offer. Trescott might have decided to accept the new terms, in which case there would have been a new and different agreement, but he had the privilege of rejecting the proposed contract entirely. Thus we see that it takes an unconditional acceptance of a definite offer to constitute a meeting of the minds of the parties.

If, however, the offeree accepts the offer as stated, but inquires whether or not the offeror will change some term or terms, the acceptance is valid. For example, Myers might have agreed to take the goods named in the offer, but might have stated that he would prefer a larger or smaller quantity or a different date of delivery. Had Trescott accepted the

changes proposed, a modified contract would have resulted and Myers would have been better satisfied.

Where possible, the best way to handle a situation of this sort is by personal interview. Then the offeree, without committing himself, can feel out the offeror as to a modification of the terms and if he finds that the offeror is veering towards a withdrawal of the offer he can head this off by an immediate acceptance.

If the offeree rejects the offer by attempting to accept it on terms varying from those offered, he cannot afterwards take advantage of it; because an offer once rejected cannot afterwards be revived without the consent of the offeror.

Uhlman v. Day, 38 Hun (N. Y.) 298

An agent of P telegraphed D an offer of 24 cents for hops. D telegraphed "25 cents or no sale." The agent telegraphed "Will take them at 25 cents. Will send some money on afternoon train." The purchase money was offered, but D refused to deliver the hops.

Held: Judgment for D. There was no contract of sale, for P did not unqualifiedly accept D's proposition. As nothing was said about credit this called for cash on delivery. P's response that he would send some money meant part cash, part credit.

§ 33. **Acceptance by Mail or Telegraph.**—If the party making the offer requests an answer by mail or telegraph, the postoffice or the telegraph company becomes his agent to receive the acceptance, and the agreement becomes effective the moment a properly stamped and addressed letter of acceptance is deposited in the mail-box (even though the letter does not reach its destination) or the moment a prepaid telegram (unless the other party had directed that it be sent "collect") with the proper address, is given to the telegraph company to be sent.

If a party makes an offer by mail or telegraph, he is regarded as having requested a reply by the same means unless he expressly asks for a reply in some other way. If the party getting the offer accepts in the mode thus requested, he is

entitled to the benefit of the rule that the acceptance is effective when sent; but if he uses some other method of acceptance, the acceptance will not be considered effective until it is actually received by the offeror.

The acceptance must be in plain, unequivocal language. For instance, in the case of Mahar *v.* Compton, 45 N. Y. Supp. 1126; 18 App. Div. (N.Y.) 536, a debtor and creditor were negotiating for the part payment of an account by having the creditor take two engines belonging to the debtor. After considerable dickering the debtor fixed a figure for the engines. The creditor wrote, "You are a great deal like my wife. I have to let her have the last say. I hope you will tell the boys to try and find a rod for the big engine. Don't load the engines yet for I am too busy to take care of them now." This, the court held, did not constitute an acceptance.

§ 34. **Acceptance of Offer Calling For an Act.**—An offer calling for an act does not require notice of acceptance. The doing of the act is sufficient acceptance. For example, an offer of a reward is accepted by the performance of the act called for.

§ 35. **Withdrawal of Offer.**—After acceptance neither party can withdraw, because then the contract has come into existence. If this were not the rule, a contract would be merely "a scrap of paper." But before acceptance, neither offeror nor offeree is bound. Consequently the offeror has the legal right to withdraw his offer even though his doing so may entail a considerable loss to the other party who is planning to accept. The offeror must, however, notify the offeree of the withdrawal, or the latter would naturally expect the offer to continue open for a reasonable time.

Let us apply this principle to the preceding section. If the offeror sends a telegram of withdrawal and later, but before this telegram reaches its destination, the offeree sends a telegram of acceptance, a contract results because the acceptance is good when sent and the withdrawal is not effective until

received. But if the offeree in this case had mailed instead of telegraphed his acceptance, telegraphing having been required, the telegram of withdrawal would be effective, because the offeree, not having accepted in the mode required, would not be protected by the usual rule.

§ 36. **Time of Acceptance.**—If an offer specifies a limited time for acceptance, it must be taken up within that time. If the offer is made by a Chicago firm to a prospective purchaser in New York and is good for three days, the New York man has until midnight of the third day to mail or telegraph his acceptance, because, as explained above, the requirement is that the acceptance be sent and not that it be received within the time limit. If the offer calls for acceptance by return mail, a reply the same day, but not by the next mail, is insufficient.

If no time for acceptance is fixed in the offer, the recipient of the offer is entitled to a reasonable time to make his decision. What is a reasonable time depends upon the circumstances. If the goods are perishable, an immediate acceptance is required. If the price is subject to sudden fluctuations, common fairness to the seller requires a prompt acceptance, because otherwise the prospective buyer could take advantage of a change in the market at the expense of the seller.

§ 37. **Termination of Offer.**—An offer terminates in the following ways:

1. When it is withdrawn and the offeree has received notice of the withdrawal.
2. When it is rejected by the offeree.
3. When the time specified in the offer as the period within which acceptance must be made expires without acceptance.
4. In the case of an offer without any time limit, when a reasonable time has elapsed.
5. When either the offeror or the offeree dies or becomes

insane before acceptance. In the case of a corporation or partnership on the dissolution of the concern.

Minnesota Linseed Oil Co. *v.* Collier White Lead Co., 4 Dill 431

D as a counterclaim asked damages for P's refusal to carry out an alleged contract based on P's telegram, transmitted to D early on August 2, 1875, offering to sell D 300 barrels of oil at 58 cents per gallon and on D's telegram of acceptance, sent early the following day. The oil market had been subject to extreme fluctuations during the previous month, prices varying from day to day and ranging between 55 and 75 cents per gallon.

Held: Counterclaim dismissed. What is a reasonable time depends on circumstances. Here P's offer, in view of sudden fluctuations, called for immediate acceptance. The delay was too long and unfair to P, as it gave D a chance to take advantage of a change in the market.

§ 38. **Options.**—Frequently a prospective buyer will get from the seller an option or refusal, good for a certain time. Although the seller, having given his word, should keep the offer open for the time promised, he is not legally bound to do so, because he is not under contract, as he has not received any consideration. He has simply extended a privilege for which he has received nothing in return. Consequently he may withdraw the privilege. So an option for which no consideration has been given may be withdrawn at any time without preliminary notice; but a mere uncommunicated decision to recall the option is insufficient. The offeror, in accordance with the rules given for the revocation of the offer, must notify the offeree that the option is terminated and until he does so the offeree may accept the offer.

When the offeree pays something, or otherwise furnishes a consideration for the option, a contract of option results, for the offeree has parted with something in return for the right to have the offer kept open a certain time.

If the offeree, after having made a contract of option, ac-

cepts the offer, the amount paid for the option will not count towards the purchase price unless the parties had so agreed.

§ 39. The Parties Must Intend a Contract.—Where a statement is made as a jest or a boast or in anger and the cause of the utterance should be apparent to a reasonable man, the statement cannot be accepted as a contractual offer. This point is well illustrated by the case of McClurg *v.* Terry, 21 N. J. Eq. 225. In this case while some young people were returning from a picnic, one member of the party challenged one of the couples in the party to get married. They took the dare, went before a justice of the peace, and were married. But they never lived together as man and wife, and subsequently one of the parties brought an action for annulment. The court granted the application on the ground that the parties had never intended to enter into a marriage agreement.

There is a distinction between offers to make contracts and invitations to deal. Price lists, catalogues, circular letters, advertisements, etc., are considered as announcements to prospective buyers and as invitations to them to send in offers to buy. When a merchant quotes prices to a prospective customer, he sometimes intends to bind himself to fill a resulting order; but in many cases he quotes prices simply as the basis for negotiations or dealings, reserving the right to accept or reject any orders.

The merchant will usually be bound, if he offers to sell a definite quantity at a definite price; but if no quantity is mentioned, the statement will be considered as a mere proposal. This point was decided in the case of Moulton *v.* Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516. In a letter Kershaw wrote the following to Moulton: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full carloads of 85 to 95 barrels, delivered at your city, at 85 cents per barrel. At this price it is a bargain. Shall be pleased to receive your order." Moulton ordered two thou-

sand barrels but Kershaw refused to ship. Thereupon Moulton sued for damages for non-delivery. The court decided that the letter was a mere invitation to deal, because to hold it as an offer to sell would mean that Moulton could bind Kershaw by ordering any quantity from one carload up. This would be unfair as Moulton might order a quantity far beyond any dealer's capacity to deliver, while to construe the letter as an offer to sell a reasonable quantity would introduce an element of great uncertainty into the contract.

A man may, of course, make an unlimited offer to sell; that is, he may give the buyer the privilege of ordering any quantity he may desire. But the seller will not be held on this basis unless the language makes it very clear that he intends to be so held.

When the seller desires to indicate that his proposition is to be taken as an offer and not as a mere invitation to deal, he may do so by stating that the proposition is a "firm bid," because this term means a definite, binding offer.

Review Questions

1. Can a contract be made orally?
2. When a contract is made by the interchange of letters, what should the letters contain?
3. What terms will be implied?
4. What are some of the usual implied terms
5. Who is the offeror and who is the offeree?
6. When does the contract arise?
7. What is the effect of a modified acceptance?
8. Can the offeree in accepting the offer safely make an inquiry in regard to a change in the terms?
9. What is the best method of making such an inquiry?
10. When does the acceptance take place in case it is sent by mail or telegram?
11. How may an offer be properly withdrawn?
12. What is the result if a letter of acceptance and a letter withdrawing the offer cross in the mail?
13. What are the rules in regard to the time of acceptance?

14. State the various ways in which the offer may terminate.
15. What is the meaning of the term "option"?
16. When is an option effective?
17. Discuss the subject of intention as it affects the agreement of the parties.
18. Give illustrations of business proposals that are not intended as offers to make a contract.
19. Explain the case of Moulton *v.* Kershaw.
20. Draw a simple contract by an exchange of letters.

CHAPTER VIII

COMPETENCY OF THE PARTIES

§ 40. Who Are Competent to Contract.—Generally speaking, all persons are able to bind themselves by contract. It is a positive right. There are, however, exceptions to the general rule. Certain persons are not competent to contract, and certain other persons have only a qualified right to do so.

§ 41. Minors.—Minors (persons who are under legal age, which is generally twenty-one) have only a qualified capacity to make contracts. That is to say, the minor may make a contract, but the other contracting party cannot enforce it if the minor chooses not to perform his part. The minor may even annul the contract after it has been performed, return the property, and demand his money back, or vice versa.

The reason for granting this privilege to the minor is that his immaturity of judgment, due to lack of business experience, may lead him to make imprudent and disastrous bargains and thus render him an easy prey for the unscrupulous.

After a minor becomes of age, he may confirm any contract made while he was a minor. He may do this either by words or by acts. If he keeps the property obtained under such a contract for an unreasonable length of time after reaching his majority, the court will consider that he has confirmed it.

The minor may disaffirm the contract in most cases before he becomes of age. An exception to this is in the case of certain realty contracts which he is not allowed to disaffirm until he reaches his majority.

If the minor disaffirms the contract, he must return to the other party any property or money that he received under the contract, provided he still has the property or its proceeds;

but if he has parted with what he received, he will in most cases be allowed to disaffirm even though he cannot restore the consideration. This is true even though he has dissipated or squandered what he received. It is necessary to allow the minor, upon rescission, to reclaim his property even though he cannot restore the adult party to the *status quo ante* because otherwise rescission would be of little practical benefit to the reckless and improvident minor, whom the law seeks to protect.

The right of cancellation is personal to the minor and may not be exercised even by the guardian. But upon the minor's death, the minor's outstanding contracts may be ratified or disaffirmed at the option of the executor or administrator of the minor's estate.

The minor's right of cancellation applies even to business contracts. If a minor goes into business and buys merchandise, he may cancel the merchandise contract after he has sold the merchandise and used the money, and still be under no liability whatever. This right, however, is qualified somewhat when the minor goes into partnership, because he cannot, in such a case, withdraw his share of the firm's capital until all the creditors have been paid. It is not safe to have business dealings with a minor unless he is known to be of such high character that he will not resort to this rather technical defense of infancy, or unless the dealings are safeguarded by a bond or a written guaranty furnished by some third party.

The minor is protected against his own inexperience, but not against his own wrong-doing; if he injures another's property, he will be liable for damages.

Mordecai *v.* Pearl, 63 Hun (N. Y.) 553; Affirmed, 136 N. Y. 625

P, a minor, deposited money with D, a stockbroker, as margin, which was lost in unsuccessful stock speculation. He never received any stocks from D and sued to recover the money deposited.

Held: For P. A minor can repudiate his orders and the orders after repudiation on the ground of infancy must be regarded legally as though they never had had any existance. As the minor never got

any advantage, there is nothing for him to return and he may secure the repayment of his money.

Falk *v.* MacMasters, 197 App. Div. (N. Y.) 357

P opened an account with D a stockbroker and in doing so falsely represented that he was over twenty-one years of age. P lost money speculating and sued for the return of the money.

Held: For D. Where a minor makes false representations as to his age he is not liable on a resulting contract, but he may not recover the consideration that he gave.

Carmen *v.* Fox Film Corporation and William Fox Vaudeville Company, 258 Fed. 703

P, a moving picture actress who was a minor made contracts with D. While these contracts were in effect she made a contract with the Keeney Corporation to give it her exclusive services. However, D notified the Keeney Corporation that she was still under contract with them. P brought an equity suit to have the contract with D cancelled on the ground of her infancy.

Held: For D. A court of equity will not assist a minor to "repudiate her pledged word of honor," although she is only morally bound.

§ 42. The Minor's Liability for Necessaries.—Necessaries are food, clothing, lodging, medical attendance, a common school education, and other things depending upon the minor's station in life. The minor is not liable for contracts for necessaries, but under some circumstances he is for the reasonable value of the necessaries. In most cases, of course, the reasonable value and the contract value are the same. On the other hand, there are cases where the merchant takes advantage of the minor and charges him an exorbitant price. This price the infant will not have to pay. The reason for this exception to the rule of non-liability is to give a minor, who is in need, an opportunity to get credit. This exception is very strictly construed by the courts. The tradesman, in order to hold the minor liable for the reasonable value of necessaries furnished, must show two things:

1. That the minor was not being cared for by the parent or guardian and was without funds of his own.
2. That the articles furnished were necessaries, i.e., articles required by the infant according to his station in life.

§ 43. **Insane Persons.**—If a person has been legally declared a lunatic and a guardian has been appointed to look after his property, he cannot make a binding contract, for the court has adjudged that he is mentally deficient. No agreement made by him can be enforced, even though the person dealing with him did not know that he was insane, because such adjudication is supposed to be known to the public. In this same class are persons who have been adjudged habitual drunkards or spendthrifts.

Such a decision has no effect outside of the state in which it was rendered. So, although a person has been adjudged a lunatic or a habitual drunkard or spendthrift, he could in spite of his incompetency in his home state, go into other states and make binding contracts.

There are people at large who should be in insane asylums. Such persons are not competent to make contracts because they cannot understand the real meaning of proposed agreements. Their contracts, like those of the minor, are voidable. They may be affirmed or disaffirmed by the insane person on his recovery to sanity or during a lucid interval, or by his guardian or representative, should one be appointed. The sane party, however, does not have the option of cancellation.

Sometimes a person is insane only on some subjects. He may have a religious mania, but still be entirely normal about his business affairs, in regard to which his contracts will be binding.

There are two exceptions to the rule that the contracts of an insane man, who has not been adjudicated, are voidable. One is where the sane party to the contract acted in good faith —that is, had no reason to suspect the other party's sanity—

and cannot be restored to his original position. For illustration, A, who is really insane, but at the time apparently normal, buys jewelry on credit from X who knows nothing of A's insanity. Then A disposes of the jewelry. As X has acted in good faith, it would be unfair to make him stand the loss; so he can hold A to the contract. On the other hand, if the jewelry can be returned to X, the contract may be canceled if this is done, for then X will not suffer any loss.

The other exception, which strictly speaking is not an exception at all, although it has the same effect, is in a case involving necessaries. The insane person is not liable on a contract that he makes for necessaries, but he, like the minor, may be liable for the reasonable value of the necessaries.

§ 44. **Married Women.**—A married woman does not have entire freedom of contract. In some states a married woman cannot make an enforceable contract with her husband, but today, in most states, she may make a contract with her husband on any subject except in regard to the matrimonial status or in regard to the household services that she is expected to render. It is safest to consult the law of the state in which one resides before entering into a contract with a married woman, as a few states still restrict her contractual capacity and give her a certain measure of contractual immunity. A married woman may, in any state, act as an agent for her husband.

§ 45. **Corporations.**—In making a contract with a corporation, one should be sure that the officer or employee representing the corporation has authority to bind it.

One should consider, also, whether the corporation is complying with the requirements of its charter and by-laws. In most cases the party dealing with a corporation is not bound by its by-laws, but is bound by the provisions of its charter or articles of incorporation. A corporation, of course, is limited by the power granted it by its charter. The interest of its

stockholders and the general public demand that a corporation be limited in this way. If it makes a contract and oversteps its limited powers, the contract is called *"ultra vires,"* meaning "beyond the powers." See §317 for a discussion of *ultra vires* contracts.

Review Questions

1. When a minor makes a contract with an adult, what is the effect of the contract on the adult?
2. What is the effect on the minor?
3. Why is the privilege of disaffirmance given to the minor?
4. May the minor affirm the contract before reaching his majority?
5. Give illustrations of acts which would constitute affirmance by a minor.
6. If a minor disaffirms a contract, may he keep what he received under the contract?
7. Can the minor disaffirm the contract even though he cannot restore what he obtained from the other party?
8. Does the right of disaffirmance apply to business contracts?
9. Is there any restriction on the minor's right to withdraw his share of the capital of the firm of which he is a member? If so, what is it?
10. What is the effect of a minor's misrepresenting his age?
11. What is meant by the term "necessaries"?
12. Under what circumstances is the minor liable for necessaries?
13. Can an adjudicated lunatic or drunkard make a contract?
14. If a contract be made between a party competent to contract and a party incompetent to contract, could the competent party refuse to do his part?
15. Under what circumstances is the contract of an insane man enforceable?
16. Discuss the competency of married women to make contracts.
17. In making a contract with a corporation, what things should one keep in mind?
18. What is the meaning of the term "ultra vires?"

CHAPTER IX

CONSIDERATION

§ 46. Definition of Consideration.—Every contract must have a consideration. The meaning of the term "consideration" is that each party to the contract must give up some legal right or agree to do something he would not otherwise have to do. As a result of the contract he must be bound to do something which he otherwise would not be required to do, or to refrain from doing something which he otherwise would be privileged to do. It is often said that the consideration is an act or forbearance, or a promise of an act or forbearance. The meaning of this is evident but most of the definitions given are extremely technical. It will be sufficient to remember that the consideration is the surrender of a legal right by a party in return for what he gets under the contract. Of course, all the parties must furnish a consideration.

Let us apply this principle to some concrete cases. A manufacturer makes a contract to manufacture and deliver certain merchandise ordered by a retailer. Here the consideration is the manufacturer's promise to use his time and capital in manufacturing the goods and the buyer's promise to take the goods and pay for them.

An attorney makes a contract to try a case for a certain fixed sum. The attorney gives up his legal right to use his time for other clients or to spend his time in some other way. The client agrees to pay him the sum fixed.

In a matrimonial engagement contract the consideration is the mutual promises of the parties. Each gives up his or her right to remain single and promises to marry the other party to the agreement.

An illustration of a consideration in the form of a for-

bearance is the case where a man selling out his business agrees not to re-engage in the same business for a certain length of time, or within a certain territory.

§ 47. **Consideration Involves a Request.**—It is not sufficient that a legal right be given up. It must be given up at the request of the other party and in return for the act of forbearance or promise of the other party. As an illustration, suppose that you were running for some political office, and, unknown to you, a friend of yours went about electioneering on your behalf. Here the friend clearly gave up a legal right, because he might have used the time he spent campaigning in some other fashion. But as you did not request the services and in fact did not know that they were being rendered, you will not have to pay anything. To vary the illustration, let us suppose that your friend notified you of his desire to help out in the campaigning, and that you consented to this. Here your consent would be construed as an implied request for the services, but nevertheless there would not be any contract because the circumstances indicated that the services were to be rendered gratuitously. On the other hand, an implied request will often be sufficient. If A starts to render services for the benefit of B without B's request and B allows A to continue, B will have to pay, if the services are such as are usually rendered with the expectation of compensation.

§ 48. **Consideration Need Not Have Any Material Value.**—The rather common idea that the consideration is the money or property value that one gets from the contract is a misconception. It is not necessary that any money be paid or promised. A matrimonial engagement, as already explained, is a contract and here there is no money consideration.

Hamer v. Sidway, 124 N. Y. 538

P's uncle promised P to give him $5000 if he would refrain from drinking liquor, using tobacco, swearing and playing cards for money

until he should become twenty-one years of age. He did so refrain and sued for the $5,000. D (the uncle's executor) contends that there was no consideration to support the promise, as P, by refraining from the use of liquor and tobacco, was not harmed but benefited.

Held: For P. The consideration may be either a benefit to the promisor or a detriment to the promisee. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." P had a legal right to do the things specified and by giving them up he furnished a consideration. Whether he thereby benefited himself is immaterial.

§ 49. A Promise Without a Consideration Is Not Binding.—A promise to do something or to give something is not a contract, since a mere promise cannot be enforced by law. There must be a counter promise or the doing of some act by the other party. Consequently, a mere promise without any consideration to pay a certain sum of money, even though in writing, could not be enforced against the promisor by the promisee. But a negotiable instrument, though originally issued without consideration, will be enforceable in the hands of a holder in due course, because the question of consideration cannot be raised as to such a holder. (See §358.)

§ 50. The Consideration of Love and Affection Is Insufficient.—The consideration must not be one-sided. Consequently, no matter how laudable the motive or how earnest the desire of the promisor, the promise will not be enforced unless the promisor gets some consideration from the other party. An illustration of this is the so-called "consideration of love and affection." A man, as a token of affection and as a reward for his son's successful college career, gives the son a written promise to give him an eight-cylinder car on his next birthday. This is not enforceable at law.

§ 51. A Moral Obligation Does Not Constitute a Consideration.—If a man, on hearing that his adult son had been taken sick in a foreign country and there had been befriended and cared for by strangers, should write to the strangers and

promise to pay all expenses incurred up to that time, he would not be bound by his promise because he had not requested that the expenses be incurred. Morally, of course, he ought to pay as he has given his word, but he would not be legally bound to do so. Another illustration is the case of a man who has been discharged in bankruptcy and who goes about orally promising the creditors to pay their claims. Here again we have an illustration of a moral, though not a legal, obligation.

§ 52. Adequacy of Consideration.—The court usually will not consider the adequacy of the consideration. It is the duty of the court to interpret and not to remake the contracts submitted to it, since there would be little use of making a contract if the court could revamp it. If we make a bargain that is advantageous for us and disadvantageous for the other side, we know that it will stand because the court does not have any time to sympathize with the people who make bad bargains.

In written contracts we often see one dollar stated as the consideration. This in nearly all cases will be sufficient. As the U. S. Supreme Court said in Lawrence *v.* McCalmont, 2 Howard (U. S.) 426: "A valuable consideration, however small or nominal, if given or stipulated for in good faith, in the absence of fraud, is sufficient to support an action. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated or paid."

There are two exceptions to the rule that the courts will not examine into the question of the fairness of the consideration. One is where there is a claim of fraud, mistake or duress. In such cases the amount of the consideration is a relevant issue because a very small consideration would tend to indicate mistake, deceit or coercion, as the case might be.

The other exception is where the contract calls for an exchange of sums of money. If the contract is to pay a large

sum for an old coin, the contract will be valid because the coin may have the value stated in the opinion of the purchaser; but if the contract were to pay $100 a month hence in return for $10 paid today, the contract would not be upheld because the parties would be providing for the exchange of sums of money as to the value of which there can be absolutely no question. Moreover, a contract of that sort would of course be an evasion of the usury laws.

§ 53. Seal as Consideration.—In the formative period of the common law, contracts were usually sealed with the seal of the parties. This was done by stamping the coat of arms of the party signing or executing the document on a bit of wax which was on a piece of ribbon attached to the document. In view of its formal execution, the document was considered by the courts as having received the careful thought and deliberation of the parties, and proof of an actual consideration was dispensed with on the theory that the consideration was supplied by the seal itself. This rule is still applied although it has been modified in many of our states. In some states the seal simply furnishes a presumption of consideration which presumption may be refuted, but it has little practical importance, if any, as far as consideration is concerned, in the following states: Arizona, Arkansas, California, Colorado, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Ohio, South Dakota, Tennessee, Utah, and Washington.

The form of the seal is not important. It does not have to be a waxed seal. It is sufficient to use the word "seal" or to use the letters "L. S." which are the initials of the Latin words *locus sigilli,*" meaning the place of the seal.

§ 54. Carrying Out a Legal Duty Is Not a Consideration.—A promise by A to carry out his uncompleted contract, is no consideration for a new promise by B. As A is obligated

to carry out his previous contract, in doing so he is simply carrying out his legal duty and is not giving up any legal right. A, for example, has made a contract to erect a building for B for a certain price. When A has partly completed the job, he finds that continuing the work will, because of the advance in the price of materials and labor, mean a great loss to him. So he prevails upon B to agree to increase the price. This promise by B, for the reason stated, will not be enforceable. A can, however, protect himself if he induces B to cancel the original contract and make a new contract.

A promise to pay more salary to an employee who is under a definite contract if he will render more effective services, is nugatory, because it is the legal duty of the employee under his contract to render the very best services that he can. Likewise a promise to pay the sheriff compensation in excess of his legal fees if he succeeds in collecting a judgment, is not enforceable, because it is the sheriff's legal duty to do his best to collect the judgment anyway.

Promises to pay money or confer other benefits on another party if he will obey court orders or the general laws are without consideration, because it is the duty of every man to obey the orders of the court and to observe the statutes.

Coleman *v.* Burr, 93 N. Y. 17

D contracted with her husband to care for his infirm mother, who was a member of their household and he agreed to pay D $5 a week therefor. D performed this duty for eight years, although it was extremely onerous and disagreeable. Then the husband conveyed to D certain realty in payment of her services. The conveyance was in good faith but creditors sought to set it aside as the husband was insolvent.

Held: For P. When a wife renders household services in discharge of a duty that she owes to her husband or which he owes to another, an inmate of the household, she is not entitled to compensation. Besides to allow a wife to contract with her husband for the payment of household services would create domestic discord and would degrade the wife by making her a menial.

Hogan *v.* Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809

P, sheriff of Pulaski County, arrested an incendiary in that county and the incendiary was convicted. P claimed a reward that had been offered for the conviction.

Held: P was not entitled to the reward. It was the official duty of P, as sheriff, to make the arrest. "A promise to pay an officer a reward for doing what it is his duty to do under the law is a promise without any consideration to support it."

§ 55. Past Consideration.—Past consideration means a promise to pay for some benefit which was rendered in the past without a request by the promisor or upon a gratuitous basis. For instance, A renders services that help to bring about the election of B to a political office and B after his election promises to recompense A. Here A in the past gave up a legal right but he did it gratuitously and not in return for any promise by B. Past consideration is not valid.

There are some exceptions to this rule. These are found in cases where the promisor waives the protection of some statute and revives what was once a binding obligation. If a debt has been outlawed by the Statute of Limitations or has been canceled by a discharge obtained in the bankruptcy court and the debtor subsequently promises in writing to pay such a debt, he will be bound.

§ 56. An Executed Agreement Lacking Consideration Will Not Be Set Aside.—If A promises to deliver certain property to B gratuitously, A, of course, will be within his rights in refusing to carry out the agreement. But if he does carry out the agreement and actually delivers the property to B, the transaction will be construed as an executed gift and A will not be able to get back the property from B or to force him to pay the value thereof.

McKenzie *v.* Harrison, 120 N. Y. 260

P and D made a lease under seal for ten years. After D had paid the rent at the full rate for one year, P orally agreed to reduce the rent $1,000 a year. D paid at this reduced rate for three years and

was given receipts for payment in full. P then sent notice to D that he would have to pay the rent stipulated in the lease and sued for $3,000, unpaid rent during the past three years.

Held: For D. Although the oral agreement being without consideration, could be repudiated as far as it remained executory, nevertheless it could not be revoked as far as it had been executed. If necessary the court will uphold the deduction as a gift.

Review Questions

1. What is the meaning of the term "consideration"?
2. Give an illustration of consideration in the form of an act.
3. Give an illustration of consideration in the form of a forbearance.
4. Give an illustration of consideration in the form of a promise.
5. Will the doing of an act by A for B without B's request support B's subsequent promise to pay A for the benefit received?
6. Is it necessary that the consideration have any money value?
7. Will the court enforce a promise to make a gift?
8. Will the court enforce a promissory note when the payee sues the maker and it is shown that the payee gave no consideration for the note?
9. If a man agreed to sell a farm for one-half of its real value, could he be made to carry out his contract? Is this just?
10. If a man had contracted to furnish certain building materials and at the time for delivery the price had advanced so that he would lose $5,000 on his contract, could he be forced to carry out his agreement? Is this just?
11. Is a consideration of one dollar ordinarily sufficient?
12. When will the court consider the adequacy of the consideration?
13. What is the effect of a seal as consideration?
14. Is a creditor's agreement to cancel a debt on payment of part, binding on the creditor?
15. Does it make any difference whether the claim is liquidated or unliquidated?
16. Is a compromise with creditors enforceable? Why?
17. What is the meaning of the term "past consideration"?
18. Give an illustration of past consideration.
19. Will an executed agreement be set aside because of lack of consideration?

CHAPTER X

LEGALITY OF SUBJECT MATTER

§ 57. The Subject Matter of Contracts.—The subject matter of a contract is that which the agreement is about. It may consist of any property, commodity, or service which could be the subject of a business transaction, or it may be to do or not to do something, such as to pay for the privilege of naming a child, or to pay a young man to abstain from using tobacco.

An agreement to do anything contrary to law is unenforceable. Here we must distinguish between illegal agreements and those contrary to public policy. An illegal agreement is one forbidden by some statute. An agreement contrary to public policy does not contravene any law, but is so injurious to the peace, good order, health, or the morals of the community that the court will refuse to enforce it.

§ 58. Illegal Agreements.—The following list, which is by no means complete, gives examples of illegal agreements:

1. Agreements to commit a crime. Illustrations are agreements to publish or sell a libelous book (libel is a crime as well as a civil wrong in most states), or to marry when the parties are already married.

2. An agreement in which usurious interest is charged. In some states the agreement itself will be enforced, but the lender will be prevented from collecting interest; in other states he will not be allowed to enforce any part of the agreement.

3. Agreements not to prosecute a person for a crime. This is called "compounding a crime." For example, an employer whose funds have been embezzled by his bookkeeper should, as a good citizen, report the case to the authorities, but he is under no legal obligation to do so; he does not have to prose-

cute the embezzler on his own initiative. On the other hand, he has no power to sell his right to prosecute. He may properly accept restitution, but when doing so he should be careful not to promise to refrain from prosecution.

4. Agreements by candidates to appoint persons to positions in case the candidate is elected or to do anything in return for aid in winning the election. Theoretically at least, the office-holder in making such an appointment should not be influenced by his own personal interests, but should be guided solely by the interest of the public.

5. Agreements to perform services by unlicensed professional men. An agreement to perform services for money, made by a medical student before he has been licensed, by a law student before he has been admitted to the bar, or by any other person who is required by the law to submit to certain requirements before being licensed to practice his profession or vocation and who is not yet so licensed, is void; any fee which may have been so agreed upon cannot be collected, although the services have actually been rendered and have conferred a real benefit on the other party.

6. Agreements to sell mislabeled food products in violation of the Pure Food Law, or some similar statute. Likewise, sales according to weights and measures that have not been inspected as the law requires, are unlawful. In neither of these cases can the seller recover his costs. The buyer is allowed to keep the goods without paying. This may seem hard on the seller, but it is the penalty he pays for violating the law.

7. Gambling agreements. Gambling is not, of course, countenanced by law. Some forms of gambling are crimes, but usually the only penalty for private gambling is the unenforceability of the transaction in the court. Stock and produce exchanges have been used for gambling purposes. However, contracts for the buying and selling of "futures" and of stock "on margin" are in all but a few states considered as

legitimate transactions on the theory that actual future delivery of the property is intended, but in the case of the "bucket shop," where no delivery is ever intended, the transactions are unenforceable.

Insurance is speculative but is not gambling, because the insured must have an "insurable interest." Fire insurance can be taken out on property only by a party who has some interest in it, and life insurance only by the part insured, his wife, child, or some other person who would be entitled to support, or by a creditor who had a claim against the person whose life was insured, or by a business partner or employer. Otherwise it would merely amount to a bet as to whether the property would be destroyed, or when the person would die.

8. Sunday agreements. The effect of such an agreement depends upon the laws of the state where the case comes up. Massachusetts, New Jersey, Pennsylvania, and Connecticut have very strict laws by which practically all kinds of work and business are forbidden on Sunday, except works of charity and necessity. On the other hand, New York is fairly liberal and Illinois permits the carrying on of any business on Sunday, so long as it does not interfere with the peace and good order of society.

People ex rel. Williams Engineering and Construction Co. *v.* Metz, 193 N. Y. 148

P built a sewer for the City of New York. The final payment on the contract was refused on the ground that P had employed laborers for more than eight hours a day when there were no emergencies. The legislature had passed a law providing that workmen on public works should be restricted to eight hours a day and that any contractor violating the provision could not collect on his contract. There was an application for a writ of mandamus to compel payment.

Held: For D. This was a clear violation of an express statutory prohibition, and P forfeits any moneys under his contract.

Stewart *v.* Thayer, 168 Mass. 519

P, under a contract, was to receive for the services of himself and band, during two months, $24 for a week of seven days for each

man, and double pay for the leader. P carried out the contract, playing seven days a week with his band at D's resort but was not paid, and brought suit for the agreed compensation. D defended on the ground that the agreement was illegal because it called for services to be rendered on Sunday.

Held: For D. The contract was entire, and part of the work contracted for was required to be performed on Sunday.

§ 59. Agreement Contrary to Public Policy.—The following agreements are examples of those which are contrary to public policy:

1. An agreement to prevent a person from marrying or to break up a marriage. The reason is that the law favors marriage, but it does not favor marriages that are arranged by marriage brokers, because such marriages often lead to unhappiness and end in the divorce court. Hence an agreement to pay a marriage broker is contrary to public policy.

2. Agreements tending to corrupt the public service. Lobbying is a legitimate activity providing the lobbying is done openly and based on the merits of the proposition; but if the lobbyist threatens, cajoles, or importunes the legislator, he oversteps the limits of the law and is not entitled to any compensation. An agreement to pay an agent a commission if he succeeds in securing a government contract for his employer, will not be enforced in the federal courts, but it will be enforced in the courts of some of the states, provided that there is no indication that the agent used or was instructed to use any improper means. In general, any agreement that tends to corrupt public officials will not be enforced. This applies to judicial and executive officers as well as to legislators.

3. Agreements in restraint of trade. The United States Supreme Court has decided that agreements in reasonable restraint of trade are not contrary to public policy. Here we have to reconcile conflicting interests. The man who buys out a business wants to be protected from the competition of the former proprietor, but the public wants free competition to

keep prices down. The solution is found by allowing a reasonable restraint. That is, the man who has sold his business may agree that he will not for a reasonable time engage in the same business again within the limits of the territory in which his business was actually carried on. Even though the restraint in a particular case appears to be reasonable, if the purpose is shown to be to create a monopoly, the agreement will of course be unenforceable.

4. Agreements that are actually or constructively fraudulent. Any agreement that works a fraud is bad; and this is true whether the fraud is perpetrated against a party to the contract or against outsiders. The courts also refuse to enforce any agreement that might tempt one of the parties to commit a fraud, even though the motive is innocent and the result equitable. The test here is not the result of a particular case but the general tendency. For example, suppose an executor of a small estate, induced entirely by a laudable desire to help the indigent widow, buys the few small securities of the estate at considerably more than their market value. The sale, although honest and beneficial, is bad theoretically, because executors, if allowed to buy the property of their estates, would be tempted to overlook their duties and to enrich themselves at the expense of the estates.

Hocking Valley Ry. *v.* Barbour, 179 N. Y. Supp. 810

D induced P to break his contract with a third party by giving a bond to indemnify P in case he should be compelled to pay damages for the breach. P, having been compelled to pay damages, sued D on the bond.

Held: For D. Since the consideration for the contract of indemnity, breaking the contract with the third party, was illegal, the contract of indemnity was unenforceable; and to enforce it would be assisting in the civil wrong done the third party.

Duval *v.* Wellman, 124 N. Y. 156

D conducted a "matrimonial bureau." P paid him money to get her a husband. The agreement was that she was to receive back money

if by a certain date she was not willing to marry any of the men to whom she was introduced by D. P sued to recover the money.

Held: For P. The lower court ruled that as the contract was illegal, P could not recover, but this judgment was reversed by the Appellate Court.

The rule stated by the lower court has limitations: (1) when the parties are not equally guilty; or (2) when public interest is advanced by allowing the more excusable of the parties to be restored to the original position. Marriage brokerage agreements are void for they result in ill-advised and fraudulent marriages. The only way to suppress them is to allow patrons to recover.

§ 60. The Law of Place.—The law which governs a contract is the law of the place where it was made. If it is to be performed elsewhere, the parties may, if they wish, expressly state that it is made in conformity with the law of the state where it is to be *performed*, provided they do not do so in an attempt to evade the law of the state where it was made. A contract made in good faith to be performed elsewhere need not comply with the law of the state where it was made if there is a conflict between the two laws, but the fact that it is to be governed by the law of a state other than that in which it was made must always be expressly stated in the contract.

§ 61. Effect of Agreements that Are Illegal or Contrary to Public Policy.—Agreements that are illegal or contrary to public policy are void. Courts treat them as if they had never existed. A case that is founded upon an illegal agreement will be thrown out of court. The court does this to discourage the making of such agreements and to penalize the parties who do make them. Not only will the court refuse to enforce an illegal agreement, but it will also refuse to undo the agreement so as to enable the party who has paid money or delivered property to recover what he parted with. The court will leave the parties as they are. This, of course, may mean that one party has been enriched at the expense of the other;

for example, he may buy whiskey and then refuse to pay for it on the ground of the illegality of the transaction. This is the seller's penalty for selling goods in violation of the statute.

There are of course some exceptions to the general principle. The public interest may require the intervention of the court. For instance, in some states in the case of marriage brokerage contracts the client will be allowed to recover the fee paid. The purpose of this is not to protect, but to destroy the marriage brokerage business. Again if the parties are not equally guilty, the less guilty party will be allowed to recover what he has parted with. This principle is usually applied in cases of fraud and undue influence. For example, in one case a man falsely stated to his wife that she was liable for certain debts and that the creditors would take her property. By this statement the husband induced the wife to transfer her property to him. Although her purpose in doing so was to defeat her creditors and consequently was contrary to public policy, nevertheless the transfer was set aside on the ground that she was not equally guilty with the husband.

Another exception is where the transaction has not been consummated and one of the parties repents. A man gives money to an agent to use for some illegal purpose, and before the money has been spent he goes to court and applies for an order directing the agent to return the money. Here the relief will be granted on the theory that it is preventing the doing of an illegal act.

Review Questions

1. What is the difference between an illegal agreement and one that is contrary to public policy?
2. What is meant by the term "compounding a crime"?
3. What is the effect of a sale in violation of the Pure Food Law, or some similar statute?
4. In such a case, does the buyer have to pay for the goods received?
5. What is meant by the term "insurable interest"?

6. Discuss the laws in regard to Sunday contracts.
7. Name different types of agreements that are contrary to public policy.
8. Under what circumstances is lobbying lawful and under what circumstances unlawful?
9. What is meant by an agreement in restraint of trade?
10. What is the test as to whether an agreement in restraint of trade is contrary to public policy?
11. What is constructive fraud?
12. What law governs the enforceability of a contract?
13. What is the attitude of the court towards contracts that are illegal or contrary to public policy?
14. Under what circumstances will the court protect the rights of the parties to such contracts?

CHAPTER XI

HOW CONTRACTS ARE MADE

§ 62. Oral Contracts.—A contract may be made simply by word of mouth or by words and acts. Such a contract is called an "oral contract." If court action becomes necessary for its enforcement, the proof will have to be given by oral testimony. The parties to it will be called on to testify as to what was said and done, and if any other people were present either party may call them as witnesses.

In such a case the difficulty is that the agreement has not been reduced to writing and the various parties present probably have entirely different ideas as to the meaning of what they heard. Certain parts deemed favorable by a party are most strongly impressed upon his memory, while other parts not so agreeable are not so well remembered, and after a year or so two men can go into court and swear honestly to absolutely contradictory accounts of the same transaction. Here the great advantage of the written transaction becomes apparent. That which is written does not change, and the law will not allow oral evidence to be introduced to contradict that which the parties have agreed to in writing. If, since the agreement was made, one of the parties has died, the written contract is even more essential to establish its conditions. Hence the prudent business man will insist that all agreements be made in writing and properly signed. Then if the agreement is well drawn, there is no question as to just what obligations he has assumed or what he may properly expect from the other party.

§ 63. Written Contracts.—The written contract need not be a formal document. Two letters, one making a proposi-

tion and the other accepting it, constitute a contract just as much as a legal document duly signed and sealed and acknowledged before a notary.

The written contract should contain all the terms—the names of the parties; a statement of the consideration with the time and the method in which it is to be paid or performed; a clear statement of just what is agreed upon, when it is to be done, and in what manner; together with any arrangements the parties wish to make if something happens to render the contract impossible of performance, or in case it is only to be performed under specified conditions, and any special provisions with regard to remedies and damages in case of default. In complicated contracts it is customary to preface the statement of the terms and conditions with an introduction setting forth the purposes of the parties in making the contract. Such a preliminary statement is helpful if any question of intent arises.

Business men are accustomed to expressing themselves clearly, concisely, and explicitly in their letters. Letters and copies are always carefully filed and preserved. For this reason when legal assistance is dispensed with, a letter from the party making the offer and a reply from the party accepting or rejecting it usually constitute the most satisfactory method of securing a written contract. Each party has his own records. Since they are accustomed to expressing themselves by letter, they understand what they have agreed to better than they might if the terms were expressed in formal legal phraseology. Even if a lawyer is called in later, the exchange of letters is a good way of making an agreement. If there is an extended correspondence before the parties finally arrive at an agreement, the last letter should sum up all the terms on which they have finally agreed, and this should be answered by a simple letter of acceptance, repeating the terms as therein stated.

The formal written contract is illustrated by the following:

AGREEMENT

This agreement entered into this 26th day of December, 1925, between Charles Davenport of Lexington, Kentucky, and George Atkins, of the same place, sets forth that the said parties have entered into the following contract:

1. Charles Davenport agrees and binds himself to take the superintendency of the stock farm of the said George Atkins known as Highland Park and situated ten miles northeast of Lexington, and to give his entire time to his duties as such superintendent.

2. His duties will require that he reside on the said premises and he is to have the use of the house on the Midland Road in the northwest part of said property for himself and family, together with the garden ground immediately surrounding it and the use of the outbuildings thereto attached.

(*Other numbered sections will set forth his duties and obligations as fully as may be desired.*)

11. In consideration of the foregoing undertakings of the said Charles Davenport, the said George Atkins agrees and binds himself to pay to the said Charles Davenport the sum of Twenty-Four Hundred Dollars ($2400) per annum, to be paid in monthly instalments of Two Hundred Dollars ($200) on the last day of each month, and in addition thereto a commission of ten per cent on the price of all live stock sold from the premises during the period of this agreement and for one year thereafter.

12. This agreement shall begin February 1, 1926, and shall continue for three years from that date and thereafter from year to year until either party terminates the agreement by giving the other party notice of his desire to terminate the agreement, six months before the next February.

In witness of this agreement the said parties have hereunto affixed their signatures this 26th day of December, 1925.

CHARLES DAVENPORT
GEORGE ATKINS

§ 64. The Statute of Frauds in General.—To do away with the uncertainty of relying on people's memories in a contract by word of mouth, a law was passed in England, in 1676, called the Statute of Frauds, which required certain contracts to be in writing. This statute has been copied in the law of most of the states of the Union. The requirement of the statute is not that the contract be written out in its entirety, but that it be evidenced by some memorandum in writing. A complete written contract is, of course, more desirable from every standpoint, but a memorandum will be sufficient.

§ 65. Contracts Covered by the Statute of Frauds.—The following contracts must be proved by a written memorandum:

1. A contract where the consideration is marriage.

Guild *v.* Eastern Trust and Banking Co., 122 Me. 514

X on his death bed, offered to give P $500,000 if she would promise to marry him, and upon her agreement to do so gave her a check for $75,000. X died the same day and the bank refused to honor the check. P sued X's executors.

Held: For P. The check is a sufficient memorandum for the amount of $75,000, but the balance of $425,000 cannot be proved.

2. The promise of an executor or an administrator to pay a claim against an estate which is in his charge out of his own money. If any property of the estate is left, the claim will be payable out of that, but in any case the executor or the administrator will not be liable personally unless there is a written agreement.

3. A promise to be responsible for the debt, the default, or the miscarriage of another. This means a contract of suretyship or guaranty, which will be explained later. (See "Suretyship.")

4. A contract for the sale of land or of any interest in land. This does not refer to a deed, but to a contract to give a deed. A deed must always be in writing. A deed which is not in proper form to operate as a deed may sometimes operate as a contract to sell the property, and the party will be compelled to give a good deed. A defective deed cannot be corrected without much trouble.

If a person makes a contract to sell or to buy land through an agent, the agent must in most states be given authority in writing to sign the contract.

Growing things, such as trees, grass, and plants that come up of themselves every year, are regarded as part of the land, and a contract to sell or to buy them must be in writing. Crops which have to be planted every year are not regarded as part of the land even while they are growing.

A lease of real property, if it is to last for over a year, must usually be in writing.

5. A contract which is not to be performed within a year

from the time it was made. A contract which might possibly be performed in a year, although it might take longer, need not be in writing to be enforceable. It is always better, however, to have such a contract in writing.

Kent *v.* Kent, 62 N. Y. 560

P agreed orally to work on his father's farm and to accept what his services were worth, payable after the death of the father, who agreed to leave his property so that P could be paid out of the estate. The father's will did not carry out the agreement and P sued the executor, who raised the defence that this was an oral contract for more than a year.

Held: For P. The Statute of Frauds does not include agreements which may or may not be performed within one year from the date of making, but merely those that cannot be performed within that time. In this case the duration was uncertain, as it was dependent upon the life of the father, who might have died within the year.

6. A contract for the sale of personal property of over a certain fixed amount in value. (This is explained fully in Chapter XIX, "The Statute of Frauds.")

§ 66. Memorandum Required by Statute of Frauds.—It is not necessary to make the memorandum at the time a contract is agreed upon. It may be made at any time before a lawsuit involving the contract is begun.

The memorandum may be very brief. It does not have to be in any particular form of language, and may in fact be very informal. It may be made up of letters or telegrams, provided they refer to each other plainly and together express the essential terms of the contract.

The memorandum must be signed by the party against whom it is to be enforced, or he will not be liable under it. Under the law as enacted in some states, this signature must be at the end; in others, it may be placed anywhere on the memorandum. At an auction or sheriff's sale the auctioneer or the sheriff is the agent for both of the parties and may sign a memorandum for either of them.

Page *v.* Cohen, 80 Misc. (N. Y.) 237

P was elected physician for his lodge for a period of one year to commence from a future date. The position carried a salary which was not paid and P sued the lodge. On the trial P put in evidence the portion of the minutes, signed by the secretary, showing his election.

Held: For P. This was a sufficient memorandum.

§ 67. **Contracts under Seal.**—The ancient significance of the seal has to some extent survived, and it is still required on documents of great importance. Deeds and mortgages of land, and in some states wills, must be under seal. A corporation generally verifies papers, particularly important documents, with its corporate seal.

§ 68. **Unilateral and Bilateral Contracts.**—Contracts are classified as unilateral or bilateral. A unilateral contract is a one-sided contract in the sense that only one side makes a promise, the other side having performed an act for which the promise is given. The following is an example of a unilateral contract.

In consideration of the sum of Seventy-Five ($75) Dollars to me in hand paid by Henry Adams, the receipt whereof is hereby acknowledged, I agree and bind myself to remove all signs projecting more than six inches from the front of the building, No. 241 Summit Street, Akron, Ohio, occupied by me as a hardware store, and I will not place nor allow to be placed any sign or other projection extending more than six inches from the front of the said building during the term of my lease which expires three years from January 1, 1926.

Akron, Ohio,
February 11, 1926.

ARTHUR ALLEN

In a bilateral contract we have an exchange of promises. In a manufacturing contract, the manufacturer promises to make up and deliver the goods and the buyer promises to receive and pay for them.

§ 69. **Implied Contracts.**—If one person accepts the benefit of another's services, the law holds that a contract to pay

for them at what they are reasonably worth is implied, and the person who performs the service may claim compensation in court.

The same reasoning holds if a person occupies land, buildings, or rooms. The law implies a promise to pay a reasonable rent. If two people have a running account with each other, the law considers that they have promised each other that the one from whom a balance is found to be due shall pay that balance to the other. The promise to pay is based on the fact that the party has willingly taken the benefit of what was done. If something was done for him without his making any request, and without his afterwards voluntarily making any use of it, he could not be charged for it.

If, without orders, a man left bread at your door every morning, and you used it, the law would imply a promise on your part to pay for the bread. If he put a new roof on your house in your absence without orders, he could not collect for it, because you would have to use the new roof whether you desired such repair or not. In case the person who performed the service intended to do it without claiming payment for it, it would be a gift and there would be no implied contract to pay for it.

§ 70. **Quasi-Contracts.**—In some cases where there is no contract, expressed or implied, but where one party has benefited by the act of the other party and should in justice pay for the benefit received, the law assumes or implies a fictitious contract and allows the party who has received the benefit to sue in a contractual action. Such an assumed agreement is known as a "quasi-contract." An example of such a contract is a case where A by mistake has overpaid B. Here there is no contract; but B through an error has received some of A's money which he ought to return. A can recover this money in a quasi-contractual action.

Review Questions

1. What sort of a contract is a marriage?
2. How is a marriage proved?
3. Why is the proving of a contract so important?
4. What is the difficulty when a lawsuit arises out of an oral contract?
5. What is the object of reducing a contract to writing?
6. What should the written contract contain?
7. Would a printed or typewritten memorandum be a written contract?
8. May a contract be made up of letters?
9. What is the Statute of Frauds?
10. Does it require that the contract be written out in detail?
11. Enumerate the six classes of contracts that should be in writing under the Statute of Frauds.
12. Does the memorandum required by the Statute of Frauds have to be in any particular form?
13. What is the rule as to signature?
14. What legal papers require a seal?
15. Would it do any harm to put a seal on a paper that did not require it?
16. What is a unilateral contract?
17. What is a bilateral contract?
18. What is an implied contract?
19. Why is an explicit contract more likely than an implied contract to prevent friction and dispute?
20. What is the meaning of the term "quasi-contract"?
21. Give an illustration of a quasi-contract.

CHAPTER XII

EFFECT OF CONTRACTS

§ 71. Effect of Mistakes.—There are two kinds of mistakes possible in making a contract:

1. A mistake as to the quality or the value of the subject the contract deals with, or as to the legal effect of the contract.
2. A mistake as to whom one is dealing with, what the agreement is about, or what is to be done under the contract.

The first heading refers to cases where one or both parties believed that the subject of the contract was more or less valuable than it actually was. You cannot avoid a contract by showing that you made a mistake in what you said or wrote. For example, a seller who in making the contract showed a wrong sample or quoted a wrong price, is bound. Parties making a contract should be careful. The court considers not what a party thinks and believes but what he says and does. You should not assume that the other party will look out for your interests by cross-examining you to make sure that you thoroughly understand what you are doing. Without the rule that a party is bound and cannot plead his own mistake where the mistake is one-sided and due to his own carelessness, contracts would not be worth the paper they are written on.

Neither will it make any difference if one of the parties did not realize that he could be bound by the contract, or did not know just what he was required to do under the law to carry out his agreement. Every man is supposed to know the law and it is his own fault if he fails to find out about it in the first place.

A mistake under the second heading will mean that there is no contract. A party cannot be forced to observe a contract with someone with whom he did not intend to contract. The parties must be considering the same thing and must be agreed as to what is to be done about it, or there is no meeting of their minds and therefore no contract.

§ 72. **Signing Without Reading.**—Every person who knows that the instrument he is signing is a contract, but fails to read it, will be bound by it, even though the contract contains provisions that he did not expect. No one should ever sign a contract without reading it.

If, however, a man is induced by trickery to sign an instrument which he is told is not a contract, and it subsequently turns out to be a contract, he will not be bound by his signature. In Wilcox *v.* American Telephone & Telegraph Co., 176 N. Y. 115, it appeared that the telegraph company desired to get a right of way from a farmer. The agent of the telegraph company induced the farmer to sign a paper which was represented to the farmer as a receipt for a payment made to the farmer for certain services rendered by him, but in reality the paper was a formal document giving the telegraph company a right to erect its poles on the farm. In deciding against the telegraph company, the court said: "It certainly would not be just that one who has perpetrated a fraud should be permitted to say to the party defrauded when he demands relief that he ought not to have believed or trusted him. Where one sues another for negligence, his own negligence contributing to the injury will constitute a defence in the action; but where one sues another for a positive wilful wrong or fraud, negligence by which the party injured exposed itself to the wrong or fraud will not bar relief."

§ 73. **Mistakes of Expression.**—If, in writing the contract, an error of some sort is made in the written document through the fault of some clerk so that the contract misrepresents the

actual agreement between the parties, the court will order it rewritten to express what the parties have really agreed upon. The mere clerical or typographical error will be corrected. If the purchase price, which was agreed upon as $100, by mistake is stated in the contract as $1,000, the agreement on the basis of $100 will stand and the contract will be reformed to carry out this intention.

§ 74. **Mistakes as to Parties.**—If a customer sends an order to the firm of A and B, and, unknown to the customer, the firm had previously become incorporated, the corporation would not have the right to accept the order. If it did so, the customer could refuse the goods on the ground of a mistake of parties. He made an offer to a firm, and a corporation, even though it is run entirely by the members of the old firm, cannot accept the offer. A man has a right to decide upon the party with whom he is willing to contract and no one else can be substituted without his consent.

§ 75. **Mistake as to Price or Quantity.**—A mistake by the seller in quoting the wrong price will, of course, be no excuse. Should the buyer, however, think that he is getting the article by the quart and the seller is intending to sell by the dozen, there is a fundamental mistake and no contract results. If, on the other hand, the seller quotes the wrong price and the buyer knows the seller is making a mistake and does not correct him, there will be no contract, because in this case it is the duty of the buyer to correct the seller. The same rules apply to a mistake in quantity.

§ 76. **Mistake as to Quality.**—If the buyer relies on his own judgment and takes the article without any statement from the seller as to its quality and then later finds the article is practically worthless, the buyer will have to bear the loss. If he wants to be sure of its quality he should get a warranty from the seller; because if the goods are warranted as perfect

and they turn out to be imperfect, the buyer can either return them or he can get a deduction from the purchase price for the imperfection. If the buyer thinks the goods are being sold with a warranty, but the seller, who in reality is not giving any warranty, notices this mistake on the part of the buyer, and does nothing to correct it, the mistake will invalidate the contract. "The law will not allow one party to accept a promise, which he knows the other party understands in a different sense from that in which he understands it." [1]

§ 77. **Effect of Fraud.**—If there was any fraud in inducing a party to enter into a contract, he may refuse to perform his side of the agreement. If the contract has already been carried out, he may recover his property or its value. If he wants to annul the contract, however, he must return anything he has received under it unless the property received had been used up or destroyed prior to the discovery of the fraud. If he prefers, he may let the contract stand and claim damages for any loss he may have suffered.

§ 78. **What Constitutes Fraud.**—A false statement standing alone does not constitute fraud. It will not be stigmatized as legally fraudulent, unless it is combined with the other elements of fraud. The elements or requisites for fraud are as follows:

1. The statement must be a misrepresentation of a past or existing fact. A statement of opinion or a promise as to the future cannot be taken as the basis of fraud, because an opinion is a matter of personal judgment and ordinarily carries with it no guaranty of correctness, but a statement of facts may be relied upon, because, before making such a statement, the party should investigate and know whereof he speaks. When a party relies on the opinion of an expert, it is a different matter. Then an expression of opinion without sound ground would be the basis of fraud.

[1] Clark on Contracts, page 205.

2. The misstatement must be of a material fact. Misstatements about unimportant matters will not amount to fraud.

3. The misstatement must be relied upon. If a buyer to whom articles have been misrepresented makes investigations on his own account and buys the goods on his own judgment, he cannot subsequently claim fraud, because his loss is due to his own poor judgment and not to the misrepresentation.

4. The false statement must be known to be false or must be made recklessly without any positive belief or adequate knowledge in regard to its truth or falsity. If the maker of the statement honestly thought that it was true, he will not have to pay damages in an action of fraud although he may be responsible in other forms of action.

5. The statement must be made seriously and with the intention that it be relied upon; if made as a joke and the other party as a reasonable man should have understood that it was a joke, it cannot be the basis of fraud.

6. The misstatement must result in injury. There can be no fraud unless damage has been done.

In most cases a mere non-disclosure will not amount to fraud; but under certain circumstances failure to disclose important facts will be considered fraud. If a party keeps secret certain facts which it is his duty to disclose, the non-disclosure will amount to an implied representation that such facts do not exist. For instance, it is the duty of an employer in taking out a bond to inform the surety company of the employee's criminal record if he has one.

The injured party must act promptly as soon as he discovers the fraud. By delay he may lose his rights.

§ 79. **Specious Schemes.**—Ordinary people of the salaried and the professional classes lose money running up into millions of dollars by investing in all sorts of specious get-rich-quick schemes. If they would study the prospectuses of these

schemers, they would see how carefully they are written so as to avoid any positive misstatements but to give a strong impression by a series of carefully worded opinions, estimates, etc. Such phrases as, "it is estimated," "it is expected," "there is every reason to believe," "it is the opinion of old miners," are used again and again. It is astonishing how plausible a prospectus can be made without giving any positive statement, except as to comparatively immaterial matters. The important matters in deciding upon an investment in a new enterprise are:

1. The character and the experience of the management.
2. The amount of capital they will have to work with.
3. The subject matter of the business.

On these essential points there is rarely any positive information in prospectuses of this sort.

§ 80. Duress.—A party must consent to a contract of his own free will. That is the essential element of an agreement. Consequently, if his will is overpowered by that of someone else, the result cannot be a contract that will hold him.

There are two ways in which a person may induce another party to make a contract against his own free will. One is by the use of intimidation or force, the other is by taking advantage of mental weakness or of affection to influence him.

If a party signs a contract in order to escape from imprisonment or detention of some kind, he has signed under duress and not of his own free will and the contract cannot be enforced. If he signs it in fear of immediate bodily harm, which he has every reason to believe the other party is capable of inflicting, the same holds true. In a case where there is no detention but merely threats, the threats must be either of bodily harm or of imprisonment to the person himself or to some near relative, or of an injury to his property, and must have been made under such circumstances that a man could reasonably believe that there was immediate danger of their being carried out.

As soon as a party escapes from duress or from fear of the threats that coerced him, he may rescind his contract and recover any property or other consideration, or value therefor, that was taken from him under the contract.

§ 81. **Undue Influence.**—Undue influence is exercised when one party takes advantage of another through near relationship, such as that of attorney and client, doctor and patient, guardian and ward, etc.; or when the second party is mentally weak and at the mercy of his more keen-witted fellow-men. A mental defective can hardly be said to exercise his own free will; contracts can readily be imposed upon him by others, and when this imposition can be proved, contracts made with him have no legal standing.

When a person takes advantage of mental weakness, or of near relationship, or of confidence reposed in him to influence another person to make a contract, it is not the free action of the second party and is no contract. People who are merely friends are not considered to be in such a position that the one can exercise an undue influence over the other. Where the consideration for a contract is plainly inadequate, it may raise a suspicion of undue influence.

If the person recovers his mental health, or is separated from the party who influenced him, he may refuse to carry out his contract and recover anything he has turned over to the other party under it.

His friends and relatives may also act for him in order to protect his property while he is still under the influence of the other party, or too incapacitated mentally to act for himself.

§ 82. **Law as to Alterations.**—Any alteration in a written contract by one party without the consent of the other makes the contract of no effect as against the other. If a person, not a party to the contract and not acting for any of the parties in it, should make alterations in it, the alterations would be treated as though they did not exist. The nature of the

original contract would be proved by the testimony of the parties, and the contract would be enforced as it stood before the alterations were made.

Parties to a contract may alter it if they can agree on the changes to be made. Even though the contract is in writing and under seal, it may be modified by an oral agreement. In most cases, however, some consideration is necessary to support the modification. If the time for payment or for performance is extended, the party thus benefited should furnish some new consideration for an extension, though in some states it is held that the original consideration is sufficient.

§ 83. **Filling in a Contract.**—If the contract is not complete, however, but blank spaces have been left for any of the terms to be filled in later, any party to it to whom it is entrusted may fill out the blank spaces in any way which would be consistent with the other terms of the contract and enforce it as he has made it. If he were given instructions for filling it out, he himself could not enforce any other contract than one that was in accordance with the instructions, but he might fill it out contrary to the instructions and transfer it to another party, who, knowing nothing of the instructions, would be entitled to enforce it as he received it. This question arises more often in the case of negotiable instruments and is discussed in § 368.

§ 84. **Interpretation of Contracts.**—A contract should be so clear that its meaning may be easily understood. As a matter of fact, many contracts are far from clear and all sorts of disputes arise over their meaning. A contract is interpreted so as to carry out the intention of the parties as nearly as may be. The court will try to interpret a contract in such manner as to make it lawful and enforceable. In this matter law and common sense coincide.

In getting at the intention of the parties where the contract is not clear, anything which is unessential and tends to confuse

the meaning will be disregarded. If there are two statements which absolutely conflict, the court will consider that the first gives the true meaning and will disregard the latter.

The parties may bring in evidence to show the meaning of any technical terms which are used, or to prove some well-recognized custom or usage of business which will explain the meaning of certain terms, or which may be considered part of the contract.

If a contract refers to any other papers or documents, these will be read in connection with it.

Rules to Ascertain Meaning of Contracts.—There are certain general rules which the court will always follow to reach the true meaning of a contract. In a printed form which has been filled out, if the written and the printed words are inconsistent, the court will disregard the printed words and follow the written ones. If any words or phrases are inconsistent with the rest of the contract, and a clear intention can be gathered from the rest without them, the court will treat them as surplusage.

If any of the terms of a contract were intentionally made ambiguous by one of the parties for the purpose of taking advantage of the other party, the court will interpret the doubtful terms in the way that will least favor the party at fault.

In trying to decide what the parties intended where the meaning is doubtful, the court will be influenced by the words and the acts of the parties at the time of making the agreement, or the manner in which they have carried it out since. Their manner of carrying out the conditions shows what they understood by the agreement.

If a general term is used, such as an agreement to do the "mason work" on a building, and there is mention of any specific kinds of mason work, such as "stone and brick work," "plastering," etc., it is a contract to do only the special kinds of mason work mentioned and not *all* the mason work on the build-

ing. To make a general contract for all the mason work, this intention should be clearly stated.

§ 85. **Letterhead Provisions.**—Another commercial fallacy of which many important business houses are guilty is to print clauses on the letterhead in the belief that they thereby automatically become part of any proposition or contract written on the paper. But the courts usually hold that such printed clauses unless referred to in the body of the letter are not a part of it. Hence, many firms that use such letterhead clauses have them printed on the stationery below the place for the superscription so that they are bound to be part of the letter.

Review Questions

1. What are the two kinds of mistakes made in making contracts?
2. What ordinarily is the effect of a mistake by one party, the other party to the contract not being at fault?
3. What is the effect of signing the contract without reading it?
4. Under what circumstances will a man who has signed a contract without reading it be allowed to show that it contained something that had not been agreed upon?
5. What is the effect of a mistake of expression?
6. Suppose that both parties have made a mistake as to the identity or existence of the subject matter. What is the effect of such a mistake?
7. What is the effect when there is a mutual mistake as to price or quantity?
8. Will a party who contracted to buy merchandise be allowed to show that he made a mistake in regard to the quality of the goods which are the subject matter of the contract?
9. When will he be allowed to show that there was such a mistake?
10. What are the essentials of fraud?
11. What is the meaning of "duress"?
12. What are the two forms of duress?
13. What is "undue influence"?
14. What is its effect on a contract?
15. What is the effect of alteration on a contract?
16. How can the parties alter the written contract?

17. What would be the effect of an alteration by a third party without instructions from either of the parties to the contract?
18. How do courts try to interpret contracts?
19. Give some of the general rules of interpretation.
20. How can trouble of this sort be avoided?
21. How do the courts construe letterhead provisions?

CHAPTER XIII

ASSIGNMENT AND NOVATION

§ 86. Assignment in General.—An assignment is a transfer of rights from one person to another.

The assignment requires an agreement because the transferee must accept the transfer, but the assignment itself is an act not an agreement.

Usually there is a consideration, but this is not necessary; a gratuitous assignment if in written form and delivered will be upheld.

The party who assigns the contract is called the assignor; and the recipient of the assignment is the assignee.

§ 87. What May Be Assigned.—A party who is entitled to rights under a contract may assign the contract provided these rights are not coupled with corresponding liabilities. A creditor may assign his claim for money due, because it can not make any difference to the debtor whether he pays the creditor or the creditor's assignee. Similarly, a contract to purchase for cash may be assigned by the purchaser, because the identity of the customer makes little if any difference, as long as he is paying cash.

§ 88. What May Not Be Assigned.—The following are not subject to assignment:

1. Liabilities or contracts involving liabilities may not be assigned. A debtor may not assign his debt because the creditor relied upon the debtor and gave credit to him and does not have to allow a substitute to be foisted upon him. For the same reason a purchaser who has a contract to buy goods on credit may not assign his contract. In either case the assignment

would be valid if consented to by the person who had given or was to give the credit.

2. Contracts involving a relation of personal confidence. This includes all contracts for personal services. No one can be compelled to work for a person unless he agrees to do so; and no one can be compelled to have another work for him whom he did not choose. Also in this class are contracts, which, although not involving a personal relation, are dependent upon the skill, knowledge or taste of one of the parties. For instance a contract with an advertising agency for the display of car "ads" which are to be designed by the advertising company.

3. Mere expectancies. Future unearned wages may be assigned provided the assignor has a steady position, but if out of employment, his hope of future wages is a mere expectancy and not assignable.

§ 89. Form of Assignment.—A party may assign a contract by simply handing the written contract over to the assignee, or by orally informing the other party to the contract that he has given up all his rights under it to the assignee. However, if there is no consideration, the assignment should be in writing because the courts will not enforce an oral assignment without consideration.

In any case the proper way to assign a contract is in writing. If the contract is a written one, the assignment is usually written on the back of it; if the contract is oral, a separate written assignment is usually made. No particular form of words is necessary if the intention to transfer all the rights in the contract is plain.

The following is a simple form of assignment:

For and in consideration of One Dollar and of other sufficient considerations, the receipt of all which is hereby acknowledged, the Sterling Power Company does hereby sell, assign, and transfer to Howard Graham the within contract with all the rights, privileges, obligations, and undertakings thereof as therein set forth.

In Witness Whereof, the signature and the attested seal of the said Sterling Power Company are hereunto affixed by its duly authorized officers this 17th day of November, 1925.

{CORPORATE SEAL}

Sterling Power Company,
By Miller Sterling,
President

Attest Seal:
Henry Welling,
Secretary

§ 90. **Liabilities of the Assignee.**—The assignee of a contract becomes liable to perform all the duties of the assignor and receives only such rights as the assignor enjoyed under the contract. If the contract was obtained by fraud, duress, or undue influence, or if the other party to it was not competent to make a contract, such other party may refuse to perform it just as though the assignee were the original party himself.

If the assignor owed the other party anything which could have been offset against the contract, the other party may offset that amount against the assignee.

§ 91. **Rights of the Assignee.**—If a party should assign all his rights under a contract to one person and afterwards assign them to another, the second assignee would acquire no rights under the contract. The second assignee would, however, be entitled to sue the party who claimed to have assigned the contract to him. If the assignor assigned only part of his rights to the first assignee, the second assignee might enforce such rights as remained.

Subject to the rights of the other party, the assignee may bring a suit to enforce the contract in all cases where the assignor would be entitled to do so.

§ 92. **Notice of Assignment.**—The assignee should notify the other party to the contract at once that the contract has been assigned to him. If there has been an assignment to any other parties, the one who is the first to give this notice will be entitled to have his rights enforced first. Then, too, it pre-

vents the other party from paying out anything to the assignor. If he should pay him in ignorance of the assignment, the assignee could not compel him to pay again to himself.

§ 93. **Novation.**—Novation is the substitution of other parties, or another party, for one of the original parties to the contract.

Where John Smith has an agreement with Henry Jones to buy a horse for a certain sum, and instead of doing so he assigns the contract to Samuel Brown, and Henry Jones agrees to take Samuel Brown as the party to the agreement, this is a novation. Samuel Brown has been substituted for John Smith, in the contract, which can now be enforced against him, Samuel Brown.

Agreement of Parties.—To constitute a good novation, all the parties must agree to the arrangement. Henry Jones must discharge John Smith from his agreement to pay for the horse, and take Samuel Brown's agreement in place of it; John Smith must have assigned all his interest in the contract to Samuel Brown, whose agreement to pay for the horse is the consideration for Henry Jones' acceptance of him as a substitute for John Smith. If any of these considerations are lacking, the novation will not be enforceable. The discharge of Samuel Brown's indebtedness to John Smith is the consideration for his promise to pay Henry Jones; and his agreement to pay for the horse is the consideration for Henry Jones's acceptance of him as a substitute for John Smith.

Review Questions

1. What is an assignment?
2. May a claim for money due be assigned?
3. May liabilities be assigned?
4. Could a teacher turn over a contract to teach to someone else?
5. Can an oral contract be assigned?
6. Write an assignment of an agreement to sell coal.

7. "I agree to sell John Doe two cords of oak wood for $25 payable on delivery, November 15, 1925, Richard Rowe." John Doe assigns this to Albert Hayes. What would be Hayes's liability? What should Hayes do immediately? Why? If Rowe fails to deliver the wood, whom should Hayes sue?
8. What are the rights of the assignee?
9. Are the rights of the assignee affected by any counter claims or offsets that the third party may have against the assignor?
10. Is it important to give notice of the assignment to the third party? Why?
11. Explain the meaning of the term "novation."
12. If one party to a contract wished to make a novation and the other party would not agree, what could the first party do?
13. What is the difference between an assignment and a novation?

CHAPTER XIV

DISCHARGE OF CONTRACTS

§ 94. How Contracts Are Discharged.—The different ways in which contracts may be discharged are the following:

1. By performance
2. By breach
3. By agreement
4. By alteration
5. By operation of law

§ 95. Discharge by Performance—In General.—The usual way to discharge a contract is by performance or fulfilment. This means performance by both of the parties. Performance by only one of the parties releases that party from liability on the contract, but does not discharge the contract or release the other party from his obligation.

§ 96. Element of Time.—Where time is of the essence of the contract, the performance must be within that time. If one party does everything required of him under the contract but does it after the time set, the other party need not accept such performance.

If no time is fixed, then the contract must be performed within a reasonable time. (See § 114.)

§ 97. Provision for Satisfactory Performance.—According to the rule in some states, where the parties agree that the contract must be performed to the satisfaction of one of them, nothing which does not satisfy him will be performance. In other states, however, the rule is that where no question of personal taste or fancy is involved, all that is required is performance which would satisfy the average reasonable man.

But universally, where there is a question of taste, art, or personal predilection, such a provision requires absolute satisfaction and the party to be satisfied may simply because of a whim reject a perfectly good performance.

Sometimes there is an agreement that the judgment of a third person shall be the test as to whether the contract is performed or not. In such case, the contracting party must abide by the judgment of this third party, unless the latter is proved to be mistaken or guilty of fraud.

§ 98. **Substantial Performance.**—Under the old common law rule, the performance must be strictly in accordance with the provisions of the contract. This has worked so much hardship and real injustice that equity has modified the doctrine, and allows a substantial performance with damages to compensate the other party for any loss he has sustained. This is especially true of building contracts, where even in an action at law substantial performance will be sufficient.

Where the deviation is so great that the actual performance is essentially different from the performance as stipulated in the contract, no recovery will be granted on the contract; but an allowance may be made in quasi-contract if the result is of some substantial benefit to the other party.

§ 99. **Tender—In General.**—When a person is prevented by the other party to the contract from carrying out his part of it, he may make sure of his own rights under it by "tendering" (that is, offering) to pay or to perform. The offer must be made by the party himself, or by someone he has authorized, at the time the contract was due to be performed, and either at the place specified in the contract for goods, etc., to be delivered, or directly to the other party or any agent he has appointed to receive them. It is safer, however, to offer them to the party himself, as then no question can arise as to the validity of the tender.

Where there are bulky goods, the person desiring to make

the tender may ask the other party to name a place where they are to be delivered, and, if he fails to do so, may notify him that the goods will be delivered to him at a certain time and place. Then delivery at that time and place will be good tender although the party is not there to receive the goods.

If a party positively states that he will not accept a tender under any circumstances, or has the party making it put off his premises or refuses to hear him, it is not necessary to make the offer. The party who sought to make the tender may show the court what happened, and will be excused. Unless it is absolutely certain that it will be impossible to make a tender, however, the party should at least try to make it. Only the absolute certainty that the attempt would be useless will be a valid excuse.

§ 100. **Time to Tender Performance.**—The tender must be made at the exact time specified in the contract, and before sunset on that day in order to give the other party a chance to examine the goods, etc. A tender before the time for performance has arrived does not meet the requirements for a tender and will not save the rights of the party making it. If the contract specifies "on or about" a certain day, or "within" a certain time, a tender made a few days before the day set would be good.

§ 101. **Extent and Kind of Tender.**—The exact amount of goods or money called for by the contract, including any interest due, and, if the other party has begun an action or suffered any damages, his expenses or the damages due, also must be offered. If it is money, the party should take care that it is in legal tender. Five-cent pieces are legal tender up to $5 and not over, while silver coins less than $1 are legal tender up to $10 and not over. United States Treasury notes, gold coins, and silver dollars are legal tender to any amount. Ordinary banks notes are not legal tender, but, unless objected to at the time, a tender in bank notes would be good.

If the contract calls for services, the tender will consist in notifying the employer that the employee is ready and willing to perform the services.

A tender must be made unconditionally. The party must simply offer what is due without calling for anything in return, not even a receipt or change, or it is not a good tender.

§ 102. **Acceptance of Tender.**—If a party keeps property or money that has been left with him after he has been given adequate time to examine and refuse it, it amounts to an acceptance of the tender. If he refuses to accept, the party making the tender may take the goods or money away, and inform the other party that he will hold them subject to his orders; he will then keep the goods or money separate from his own property and ready at all times for the other party if he calls for them. If the money is deposited in a bank, it must be put in a separate account and not drawn upon.

§ 103. **Application of Payments.**—A debtor, who owes several items to the same creditor, may in making a payment specify to which item it is to apply. In the absence of any direction, the creditor may apply it as he chooses. But if the debtor gives no direction and the creditor makes no specific application, then the payment is to be credited to or against the oldest item. This may be important when third parties, endorsers, guarantors, insurers, etc., are involved.

§ 104. **Discharge by Breach.**—When one party is guilty of breaking the contract in some essential respect the other party has the option of canceling it. If the latter does so, he is discharged from any further obligations on the contract. This subject of breach of contract is discussed in Chapter XV.

§ 105. **Discharge by Agreement.**—An agreement between the parties to rescind a contract, or a later agreement between the same parties with regard to the same subject matter, the

provisions of which later agreement are inconsistent with the contract, will discharge the original contract.

The agreement to rescind the contract must, like all other agreements, conform to all the rules governing contracts. The release of one party from his obligations is the consideration for the release of the other from his. But, where one party has performed his part of the contract, there must be some new consideration to him for releasing the other, or the agreement to rescind will not be enforceable. The courts will not interfere in most cases, however, where an agreement of rescission without consideration has actually been carried out.

If two parties to an agreement make a new agreement about the same subject matter which is inconsistent with the old agreement in any way, the old agreement will be discharged to that extent. For instance, in an agreement of novation (see §93), by accepting the substituted party, the other party discharges the party who substituted him from his obligations under the contract.

If the parties put an oral agreement into writing, or replace a written agreement with a new written contract, the old contract is discharged and they are bound only by the new agreement.

§ 106. Form of Discharge by Agreement.—The parties may sign a brief statement on the contract itself or on a separate paper to the effect that they have mutually discharged each other on the contract.

The more usual method is for the parties to exchange general releases.

The seal on the general release will in most states be a sufficient consideration; but even in those states where the seal is no longer regarded as showing consideration, the general release will be upheld because it is desirable to have a recognized document for discharging obligations.

A form of general release appears on page 86.

To All to Whom these Presents Shall Come or May Concern

Greeting: Know Ye, That I, James A. Foster, of the City, County and State of New York, for and in consideration of the sum of One Thousand dollars lawful money of the United States, to me in hand paid by Harrington Bros. Co., of 417 Broadway, Borough of Manhattan, City and State of New York, have remised, released, and for ever discharged, and by these Presents do for myself and my heirs, executors and administrators remise, release and forever discharge the said Harrington Bros. Co., their heirs, executors and administrators of and from any and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, premises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity which against Harrington Bros. Co. I ever had, now have or which my heirs, executors or administrators hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents. And more particularly from any claim, action, debt, etc., arising out of merchandise shipped on consignment by me to the Harrington Bros. Co.

In Witness Whereof, I have hereunto set my hand and seal the Ninth day of December, one thousand nine hundred and twenty-five.

James A. Foster (L. S.)

Sealed and delivered in the presence of
Harry E. Hartmann

State of New York
City of New York } ss.
County of New York

On the Ninth day of December, in the year Nineteen hundred and twenty-five, before me personally came James A. Foster, to me known and known to me to be the individual described in, and who executed the foregoing instrument and he acknowledged that he executed the same.

Howard F. Smith,
Notary Public

§ 107. **Accord and Satisfaction.**—When the parties agree to replace an existing contract with a new contract, the latter is called an *accord*. When it is carried out there is a *satisfaction*. But the original contract will not be discharged by *accord* and satisfaction, unless the *accord* is executed.

Fuller v. Kemp, 138 N. Y. 231

P, a physician, sent D a bill for $670 for professional services. D replied, disputing the charge, and enclosing a check for $400, which he stated was in full satisfaction of P's claim. P collected the check and sent a bill, charging the same amount as before but crediting the $400. P sued to recover the balance of the account.

Held: For D. There was an accord and satisfaction of P's claim. Where a debtor offers a certain sum of money in full satisfaction of

an unliquidated demand and the creditor accepts and retains the money, the claim is canceled, and no protest, declaration or denial on his part can vary the result.

§ 108. **Discharge by Alteration.**—If one party, without the consent of the other, makes a material alteration in the contract, the other party may elect to discharge the contract. Or if he chooses, he may insist upon the carrying out of the contract according to its original tenor.

A material alteration is one that changes the legal effect of the contract, such as a change in the date, the amount, the time of performance, or in any of the contract provisions. A change in punctuation or wording, not affecting the sense, would be immaterial.

§ 109. **Discharge by Operation of Law.**—A contract will be discharged by operation of law in two cases:

1. By bankruptcy.
2. By impossibility of performance.

§ 110. **Discharge by Bankruptcy.**—When a person goes into bankruptcy and gets from the bankruptcy court what is called a discharge, he is discharged from most, if not all, of his contract obligations, as there are only a few special liabilities that are not wiped out by the bankruptcy discharge.

§ 111. **Discharge by Impossibility of Performance.**—There are some cases in which impossibility of performance discharges a contract. The chief cases are the following:

1. Personal Service Contract.—If a contract is made for personal services and the person becomes ill or dies, the contract will be discharged and there will be no liability for damages by the person who agreed to render the services or by his representatives. The parties are presumed to have realized that if such a thing were to happen, the contract could not

be performed, and to have made the contract on this understanding.

2. Destruction of Particular Article Contracted For.—If a contract is made for a particular article and this article is destroyed, the contract is discharged because the contract was based upon the existence of a particular subject matter and that subject matter is no longer in existence. The buyer will not be required to take anything else nor will the seller be required to supply anything else.

3. Acts Impossible at Time of Making of Contract.—If a contract were made for the sale of a house and unknown to the parties the house had burned down before the contract was signed, the agreement could not be carried out because the subject matter was not in existence when the parties tried to contract.

4. Act of God.—Performance may become impossible by what is known as an "act of God," that is, a tornado, a hurricane, a flood, an earthquake, etc. If a contract is made to do some definite act by a definite time, however, an act of God will not excuse failure of performance, because if a man takes upon himself a certain definite obligation, he must meet that obligation, no matter what unforeseen conditions may arise.

5. Impossibility Created by the Other Party.—The act of the other party in making performance impossible will be a valid excuse. If a contract is made to erect a building, and the owner of the land refuses to allow the builder to come on the premises and finish the job, the owner, of course, cannot object to the fact that the builder has not finished the work.

6. Impossibility Created by the Government or by a Change in the Law.—If a new law is passed which makes the performance of the contract illegal, the parties, of course, will not expect to perform it, and non-performance will be excused. For example, a contract may be made to erect a building and

the municipal authorities may thereafter pass an ordinance forbidding the erection of a building in the neighborhood in question. The passage of the ordinance will, of course, discharge the contract.

Another application of this principle is seen in case of war. When two countries go to war, all possibility of friendly relationship between them ceases. All contracts between their citizens on which nothing has yet been done are discharged. If anything has been done by either party under the contract, and it is possible to do so without injustice to either party, the contract will merely be suspended until the war is over, when it must be carried out fully in accordance with its terms. For example, an insurance contract.

§ 112. **Contingencies Beyond Control Clause.**—That the defence of impossibility of performance may unquestionably be availed of, it is customary in many contracts to insert a stipulation guarding against strikes, accidents, fires, the outbreak of war, etc.

The common form of stipulation exempts the seller or the contractor from liability in the event of certain contingencies enumerated and then adds the clause from "any other contingency beyond the control" of the party. This wording, however, is insufficient, as the courts restrict "other contingencies" to ones *similar* to those enumerated. The following is a form of stipulation that is sufficient:

> We reserve the right to cancel, at any time, orders and/or contracts or unfulfilled portions thereof, when performance of the same is prevented, directly or indirectly, by war, embargo, fire, strikes or labor troubles, inability to procure supplies, governmental action, accidents, or any cause whatsoever beyond our control (whether or not similar to the cause enumerated) and we are not to be liable for any failure, occasioned directly or indirectly, wholly or in part by any such cause, to fulfill any requirement of any contract or order, canceled or uncanceled.

Review Questions

1. In what ways may a contract be discharged?
2. If a contract states "delivery must be made by December 1, 1919, and time is an essential part of this contract," would delivery on December 2, 1919 be "substantial performance"?
3. How do the courts construe a provision that performance must be to the satisfaction of one of the parties?
4. What is meant by "substantial performance"?
5. What is the object of making a tender?
6. To whom should the tender be made? When?
7. When is a tender unnecessary?
8. What kind of money should be used in making a legal tender?
9. If a party retains a tender, is it an acceptance?
10. If the tender is refused, what should the tenderer do?
11. Should the tenderer have a witness?
12. In what order should payments be applied?
13. Is a party making a payment entitled to a receipt?
14. May one party cancel a contract without the consent of the other party?
15. May both parties to a contract agree to rescind it?
16. What effect does a new agreement concerning the subject matter of an existing contract have on the contract?
17. What are the methods of discharging a contract by agreement?
18. Explain accord and satisfaction.
19. Explain discharge by alteration.
20. How does a discharge in bankruptcy affect the contracts of the bankrupt?
21. How does the question of impossibility of performance arise in contracts for personal service?
22. When the contract calls for a particular article, what effect does the destruction of that article have upon the existence of the contract?
23. What are acts of God?
24. What effect has war on contracts?
25. How may the parties to a contract protect themselves against the occurrence of contingencies beyond their control?

CHAPTER XV

ENFORCEMENT OF CONTRACTS

§ 113. **Breach of Contract.**—A contract may be broken by either party in one of several ways, such as:

1. Failing to perform the contract.
2. Refusing to perform the contract.
3. Making performance impossible for himself or the other party.

§ 114. **Failure to Perform.**—If a party breaks a contract by failing to perform it, the other party must have done all that can be required from him under the contract before he is entitled to bring suit. If he himself had previously been guilty of a breach, he cannot take advantage of a subsequent breach by the other party. If one party was to perform work or to deliver goods for which the other party was to pay, he must be able to show that he has either performed or offered to perform the work, or that he has delivered or offered to deliver the goods, before he has any right to claim damages. A party must remain ready and willing and in a position to perform what he agreed during the entire time of the contract; but such readiness, willingness and ability to perform need not be maintained after a definite breach by the other party. Of course, if his part of the contract was to pay after the other party had performed it, he need not pay until such performance.

It is often hard to determine just when a contract has been broken by failure to perform. Unless the time within which it was to be performed was an important part of the value of the contract, the courts usually give parties what they consider a reasonable time in which to complete it, whether the contract sets a definite time for its completion or not.

A Reasonable Time.—The difficulty is to know what the court will consider a reasonable time. The parties, however, may themselves solve this time problem by having the contract state that a certain specified time is to be allowed and that time is "of the essence of this contract," i.e., a condition. Then the court will strictly enforce the time provision. But if there is no such time provision, the party for whom the services were to be performed or to whom the goods were to be delivered, etc., may demand that the other party fulfil his part of the contract within a certain time or he will consider it broken. If he has really given the other party a reasonable time, he will have a right to bring action if the services agreed upon have not been performed within that time.

§ 115. **Refusal to Perform.**—If a party refuses to perform the conditions of the contract when the time comes for performance, he thereby relieves the other party from any further obligation and gives him an immediate right to sue for damages.

In any case, the refusal to perform must be a definite and positive statement, if advantage is to be taken of it. A statement that the party is disinclined or unwilling to perform cannot be considered as a clear renunciation of the contract.

§ 116. **Making Performance Impossible.**—If a party makes it impossible for himself to perform a contract by disposing of its subject matter, the other party is immediately relieved from all obligations and has a right to sue at once for the damages he has sustained. For example; a man who has made a contract to sell his house to A sells the house to X.

The same principle applies where one party prevents the other party from performing. (See § 111.)

§ 117. **Remedies for Breach of Contract.**—It is important to determine whether the breach is of an essential or of an unessential term. For example, a man makes a contract to pay a

certain sum for the purchase and installation of a certain machine. Is the provision for installation a vital term of the contract? It depends upon the circumstances. If the purchaser can find mechanics with sufficient knowledge and skill to install the machine, he should do so and deduct from the purchase price the expense of the services of the mechanics. On the other hand, if the machine is of such a new and intricate type that it can be installed only by the seller's own expert mechanics, the buyer, of course, cannot be expected to take the machine, because it would be useless to him unless installed as provided for in the contract. In the first case the provision for installation is a non-essential term, whereas in the second case it is an essential term or condition of the contract.

Thus, the breach of an essential term or condition of the contract gives the injured party the right to refuse to go ahead, that is, to cancel the contract. But the breach of a non-vital term or stipulation of the contract simply gives the injured party the right to claim damages; he must continue to perform his part of the contract.

The moment a contract is actually broken the other party has a right of action for damages, but there must be an actual breach. People are inclined to rush into court when they think that their contract rights are disregarded, without stopping to make sure that there has actually been a breach. If an action for breach of contract is to be brought at all, it is best to do it as soon as possible after the contract has been broken, as the court may consider that a person has voluntarily surrendered his right if he waits too long.

§ 118. Separable and Entire Contracts.—If a contract is made up of several parts which are mutually independent, the party who performs part but not all of such a contract may recover for the part performed. For instance, a clothier makes a contract to supply a young man with a hat, an overcoat, a suit, and a necktie. He delivers only the hat and the suit.

He is entitled to collect for these and the customer would have to take them. On the other hand, if a young man buys a costume for a fancy dress ball and the costumer failed to deliver an essential part of the costume, the customer could refuse to accept the incomplete costume. In the latter case, the contract would be what is known as an "entire contract" and complete performance would be required.

In instalment contracts, such as a contract to deliver 1,000 barrels of oil at the rate of 100 barrels every month until the contract is completed, it is sometimes difficult to determine whether the failure to deliver one lot would be a breach of the whole contract or not. Various states hold different views on this question.

§ 119. Recovery for Part Performance.—Where there has been a breach of a vital term of a contract by one party after the other or innocent party had partly performed, the latter has a choice: he may recover in quasi-contract the reasonable value of what he has done; or he may sue for damages for the breach by the other party, and in such action may recover for his part performance according to the price or schedule of prices fixed in the contract; in addition, he will be allowed damages for the balance or unperformed part of the contract.

Even in the case of an entire contract the party who has been guilty of a breach because he has completed only part of his obligations will, in most cases, be allowed the reasonable value of what he has done.

Where one of the parties is prevented from performing a contract for personal services by sickness or death, he or his estate may recover the value of what he has already done; where a contract is unenforceable because of the Statute of Fraud but has been performed in part, the party who has this part performance to his credit will be allowed to recover on the basis of reasonable value up to the extent of his performance.

§ 120. **Specific Performance.**—There are some cases in which damages could not repay the party for what he lost on the contract, as, for instance, a contract to buy some valuable work of art which could not be duplicated elsewhere. In contracts for the delivery of goods, where it is possible for the party to go out and to purchase other goods of the same nature, his loss can easily be computed and covered by damages; but where it is impossible to compute the damages, or where the property purchased is a work of art, an heirloom, or something else which cannot be duplicated or easily purchased elsewhere, so that damages do not compensate him for his loss, the court will compel the other party to perform the contract. This is known as "specific performance," and is granted by a court of equity.

Land, with everything relating to it, is always regarded as having a peculiar value; so a contract for the sale of land may always be specifically enforced.

In cases where the contract is for personal services, or cannot be carried out because the other party has disposed of the property involved, or for any other cause, the court will refuse to make a useless decree. In the case of personal services, it is not considered that any services which the other party might perform to escape imprisonment would be worth much.

§ 121. **Rules of Evidence.**—Certain rules have grown up with regard to the admission of evidence before a court. Some of these rules have been dictated by convenience, in order not to take up the time of the court unnecessarily; others for the sake of being fair to both parties. Some of the rules of evidence particularly concern contracts.

An oral contract must be shown by testimony. The testimony of the parties themselves, and of any witnesses who were present and heard the transaction, is competent; but anything in their conversation or relations which has no bearing

on the contract will be excluded. It often happens that contracts are agreed upon between the two parties, and each remembers only the part that favors himself; in such a case a court cannot give any relief, because the evidence balances. Where it is not possible to prove the making of the contract itself satisfactorily, evidence that the party in some way acknowledged or ratified it, or that he has partly performed it, may be introduced to show that there was such a contract.

The Burden of Proof.—The burden of proving anything is always on the party who asserts it; thus many cases fail, not because the party is in the wrong, but because he cannot prove his case. Judges and juries can act only on evidence brought before them, and if a case is good but there is no evidence to prove it, a court cannot give relief, and the law should not be blamed for it. This is why written contracts are so important.

The Parol Evidence Rule.—The meaning of the parol evidence rule is that other evidence will not be admitted to vary the terms of a written contract, because the contract itself is the best evidence of what its terms are. Generally, however, the performance of the contract, or a breach of it, will have to be shown by oral testimony. The same is true of abandonment of the contract; and anything which would show adequate motive may be introduced as tending to support the proof of the abandonment.

There are exceptions to the parol evidence rule. Where the contract is not clear in itself, it becomes necessary to resort to parol evidence to explain it. Any other paper or matter to which the contract refers may be proved in connection with it, and, if such paper shows on its face that the transaction outlined was not complete, the whole transaction may be proved. Oral evidence may always be introduced to show fraud, duress, undue influence, or illegality in the contract. The rules of evidence may even be stretched in such a

case to allow the proof of other transactions not directly connected with the contract under consideration, tending to prove a fraudulent contract.

Admissions.—A party will never be allowed to use his own statements and acts unconnected with the actual contract or the transactions leading up to it, to prove that there was a contract, or that what he claims as to its terms is true, but he, however, may prove anything which the other party said against his own interest, and then the other party may show any other statements made in connection with the admission which might have limited its effect.

Where a party employs an agent to deal for him, any admission against the employer's interest which the agent made at the time of, or during the transactions leading up to the contract, may be used against the employer; but not admissions which the agent made *after* the execution of the contract.

Transactions With a Party Deceased Thereafter.—To protect estates against fraud, where a person is suing to enforce a contract against the executor or the administrator of a person who is dead, he will not be allowed to testify to any transactions which he had with the dead person, where there were no other witnesses present to testify as to what the dead person said or did. This is very important to remember, because, in the case of an oral contract where no witnesses were present, the party who is still living might not be able to prove the contract at all; this is another reason why all contracts should be reduced to writing.

§ 122. **Statute of Limitations.**—The Statute of Limitations is the law that specifies the time limit within which an action may be brought. For the sake of peace and in order to put some limit to the time in which rights of property, etc., can be upset by lawsuits, laws have been enacted in every state providing that after a certain length of time specified in the law, actions may not be brought in the courts. These laws

apply to all the various forms of actions, including those on contracts. If the contract is under seal, the law usually gives a longer time in which to bring action on it.

Review Questions

1. If A agrees to rent B his home beginning October 1 and is unable to move out until October 2, so that B is not able to move in until October 3, can B consider the contract broken? Give reasons.
2. If a contract is made to dig a cellar and the party who is to do the work is notified to stop after he has commenced to excavate, what would be his legal rights? Suppose he continued to work and finished the job?
3. What is necessary to constitute a renunciation to the contract?
4. When one party definitely announces that he will not perform the contract, does the other party have to wait until the expiration of the contract period before starting suit?
5. If a contract is separable, what is the effect of a part performance?
6. If the contract is entire, what is the effect of a part performance?
7. Is an instalment contract considered as a separable or an entire contract?
8. If a man agrees to overhaul certain machinery and after doing half the work quits on account of sickness, can he recover for what he has done? How much can he recover, i.e., what would be the measure of his recovery?
9. If a tenant fails to pay rent at the end of the month, can the landlord bring suit? For what would he sue? If he has the tenant dispossessed, is he entitled to the rent for the balance of the period of the lease?
10. What is the meaning of the term "specific performance"?
11. In what cases will the court usually decree specific performance?
12. How is an oral contract proved? What does the court do when each party remembers only that part which favors himself? How can this be avoided?
13. What is meant by the term "burden of proof"?
14. What is the rule as to parol evidence? Give some exceptions to this rule.
15. What is meant by "an admission"?
16. What is the rule as to admissions?

17. What is the rule as to an admission by an agent? Why?
18. What is the rule as to testimony in regard to transactions with persons who have since died?
19. What is the object of the Statute of Limitations?

CHAPTER XVI

DAMAGES

§ 123. When Damages Are Allowed.—Damages are allowed only for an actual loss sustained. The general theory of damages is that the party who has been injured by the breaking of a contract should, so far as money can do it, be placed in the same position he would have been in if the contract had been performed. So he is given a judgment for a sum of money, which, if paid, will compensate him for the monetary loss sustained. But he is not allowed anything for loss of time, inconvenience, worry, or the expense of attorney's fees.

If a party suing for damages for breach of contract proves that the contract was breached but is unable to prove that any actual damages resulted he will win a hollow victory with an award of six cents representing nominal damages.

§ 124. Damages Are Allowed for a Certain but Not a Speculative Loss.—Before a party can get an award of damages, he must show by a preponderance of the evidence that he has suffered some financial loss as the result of the other party's failure to carry out the contract. He must show that he has lost money which he would have made if the contract had been carried out. In other words, where A breaks the contract, B, the other party to the contract, to recover a verdict must show that the performance of the contract would have netted him a profit. If there is any serious question as to the financial outcome of the contract to him, he will not be allowed damages. In new ventures and in complicated business enterprises the outcome of the average contract is problematical. As an example, take a contract to deliver machinery. The machinery is not delivered. The buyer of the

machinery claims that he has lost an opportunity to make large profits because of the non-delivery of the machinery. The net return from the orders that he could have accepted had the machinery been delivered would depend on his skill, experience, managerial ability, the cost of material, labor conditions, the general efficiency of his plant, and other factors. Because of the numerous factors involved, it cannot in the ordinary case be said with any degree of certainty that he would have made profits from the operation of the machinery. Consequently, he will not be allowed anything for lost profits and will be restricted for damages to the difference between the price he was to pay for the machinery and the price that it sold for in the market at the time of delivery; or if he ultimately accepted the machinery, he would be allowed for the rental value of the machinery during the period of the delay. If the factory had a past record of successful operation and it could be shown that the conditions during the period when the delivery of the machinery was delayed were similar to conditions in a previous period when profits were made, then there would be justification for allowing damages on the basis of lost profits.

If it is clear that one party has suffered a loss because of the breach of contract, but the amount of the loss is not definite, the injured party will not be forced to forego damages simply because he cannot show the amount of damages down to the last cent. In such a case, the jury will be allowed to estimate the damages. Consequently, the important factor is not the amount of damages, but the certainty that damages of some amount have been suffered.

§ 125. Damages Are Allowed Only for the Natural and Immediate Consequences of the Breach of Contract.—The injury for which damages are claimed must be shown to be a direct or natural result of the breach of contract. If the loss for which compensation is claimed is an indirect result of the breaking of the contract, no damages will be allowed. In

other words, the breach of contract must be the direct cause of the loss. An example of this is the rather odd case of Coppola v. Kraushaar, 102 App. Div. (N. Y.) 306. In this case the plaintiff had ordered from the defendant, a dressmaker, two gowns for his betrothed. He told the dressmaker that the wedding was to take place on the 19th of the month and that the gowns must be ready the day before. He paid a deposit of $10. On the 18th the gowns were demanded from the defendant but they were not ready. In consequence of the dressmaker's failure to deliver the gowns, the engagement was broken by the girl and the plaintiff thereupon sued for his expenses "in buying presents, wine, clothes, etc." The court held that the plaintiff was entitled to $10, i.e., the return of the deposit, but that the other damages claimed were too remote, as they were not the natural results of the dressmaker's breach of contract. The ordinary girl, under the circumstances, instead of breaking the engagement would have gone ahead with the marriage or postponed it until her trousseau could be completed.

In the case of Brooks v. Bank, 69 Hun (N. Y.) 202, the plaintiff sued his bank for $50,000 because the bank failed to pay his note, although he had on deposit a greater amount than the amount due on the note. On hearing of the failure to pay the note, the plaintiff's creditors, becoming alarmed, got judgments and levied executions with the result that his business was ruined. The court held that the destruction of the business was not the direct result of the bank's failure to pay. In other words, the immediate cause of the action of the creditors was the plaintiff's shaky financial condition and the action of the bank was simply a remote cause.

§ 126. Damages Are Allowed Only for Results that Were Understood by the Parties as the Probable Results of a Breach.—This principle is very similar to the principle discussed in the preceding paragraph. When a party makes a

contract, he understands or at least should understand at the time of making the contract that certain consequences will ensue in the event of his failure to carry out his obligations and he impliedly agrees to be responsible for any money damages suffered by the other party in the event that these consequences do ensue, but he does not agree to be responsible for any unexpected or remote results. An illustration of this is the case where A makes a contract to sell B a certain quantity of goods. B's plan is to use these goods in making up finished products which he contracts to sell to X, Y, and Z. A does not make delivery. Consequently B cannot carry out his contracts with X, Y, and Z, because he cannot get the material from any other source. A, as damages, will have to pay to B, the difference between the contract price and the market price on the date of delivery, but he will not have to pay to B any damages that B has had to pay out to X, Y, and Z, because A did not know of the contracts with X, Y, and Z. On the other hand, if B, at the time of making the contract with A, explains to A that his plan is to use the goods he is ordering from A in manufacturing finished products to be resold to certain customers and that he is relying on A to make prompt delivery, then A understands that in the event of his failure to carry out the contract with B, he will be responsible for all amounts that B may have to pay out in damages to his customers.

§ 127. Damages Must Be Reduced as Much as Possible. —When a contract is broken, the injured party cannot calmly sit by and allow the damages to roll up in the expectation that the party breaking the contract will have to foot the entire bill but he should take all reasonable steps to minimize the damages. Suppose for example, a lease requires a landlord to make all repairs. The tenant notifies the landlord that the roof is leaking but the landlord refuses to do anything about it. The tenant has a very valuable stock of goods which he

is finding trouble in selling. These goods are stored directly under the leaking roof. The tenant allows them to stay there and be ruined by the water coming through the roof, because he thinks that the landlord will have to pay for them. The tenant cannot get damages; allowing him to recover under these circumstances would put a premium on wastefulness and negligence. Another illustration is the case of a manufacturer who, while engaged in manufacturing goods under an order, gets word from the customer to stop work on the order. The manufacturer should stop at once and charge the customer only for the work done up to date and for the profit he would have made had he carried out the order. This will enable the customer to save a considerable amount because he will not have to pay the full price; on the other hand, the manufacturer will get all his expenses and his full profit; so he is not losing anything. If the manufacturer carries out the order completely, he will be turning out a product that will be practically useless to the customer. Thus, the manufacturer will not gain any more than he would under the system outlined. Another example is found in contracts of employment where the employee is dismissed before his time is up. He cannot go off and take a vacation at the expense of the ex-employer, but should make a reasonable effort to find another job in the same line. If he makes no such effort, he will not be allowed to recover any damages whatsoever.

§ 128. **Damages for Breach of Contract.**—When a breach of contract occurs, the injured party may sue for damages immediately. He does not have to await the expiration of the contract period or give the other party any chance to repair the breach. Furthermore, he may sue for damages for the entire period of the contract.

The measure of damages usually will be, not the consideration, but the normal loss. If the buyer in a contract of sale refuses to accept delivery of the goods, the normal dam-

ages, provided the goods are readily resaleable, will be the difference between the contract price and the market price prevailing at the time of delivery. But where it is difficult to determine the loss, the consideration or price will be taken as the amount of damages. So in the sales contract, if the goods lack ready marketability, the seller will be allowed a judgment against the buyer for the price, the seller holding the merchandise against the payment of the judgment.

As the amount of damages is in many cases hard to compute, the parties to a contract sometimes agree in advance on the amount to be allowed as damages in the event of a breach: they do this by putting into the contract a provision for "liquidated damages." The courts will enforce such a provision if it is reasonable and intended as agreed damages; but they will not enforce it if it is in reality a penalty disguised as "liquidated damages" because the courts are opposed to penalty provisions in contracts.

Review Questions

1. Explain the theory of damages.
2. What is indicated by a verdict of six cents?
3. If a mill fails to deliver cloth to a tailor, can he recover as his damages the profits that he expected to make on the garments that he would have made up out of the cloth and sold, had the cloth been delivered?
4. If a builder does not finish the building within the contract time, will he have to pay as damages the amount of the rentals which the owner claims he could have secured during the period of the delay, had the building been completed on time?
5. Is it always necessary to show the exact amount of damages in dollars and cents?
6. Suppose an agent telegraphs his employer for $50. The telegraph company in transmitting the message makes a mistake so that it calls for $500. The employer, thinking that the request is for $500, telegraphs this amount to the agent. The agent absconds with the $500. Will the telegraph company be liable for any amount to the employer, and if so on what theory? What is the

immediate cause of the loss in this case—the mistake of the telegraph company or the character of the agent?

7. If the damages are aggravated by special circumstances unknown to the party breaking the contract, will he be responsible for the full extent of the damage?
8. Suppose that a garage with which you have made a contract for the storing of your automobile refuses to allow you to put the car in. You then leave the car on the street in front of the garage. The next morning you find that the car has been stolen. Would the garage be responsible for the loss of the car because of its failure to carry out its contract for the storage of the car? Give reason.
9. If you make a contract to sell perishable fruit and the buyer refuses to take it, are you under any obligation to try to sell it to someone else? Why?

Sales

CHAPTER XVII

GENERAL CONSIDERATIONS

§ 129. Uniform Sales Act.—On account of the confusion of the law in regard to commercial transactions, commissions have been appointed by the various states to unite in working out uniform laws governing such transactions. As a result of these activities, we have a number of uniform laws or codes. The best known of these is the Uniform Negotiable Instruments Law which has been adopted in all the forty-eight states of the Union except Georgia, and in all the territories except Porto Rico. In connection with sales, we have the Uniform Sales Act, and on allied subjects, the Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act.

The Warehouse Receipts Act has been adopted in all the states except Georgia, Kentucky, New Hampshire, and South Carolina.

The Uniform Sales Act has been adopted in the following states:

Arizona	Minnesota	Pennsylvania
Connecticut	Nebraska	Rhode Island
Idaho	Nevada	South Dakota
Illinois	New Hampshire	Tennessee
Iowa	New Jersey	Utah
Maine	New York	Vermont
Maryland	North Dakota	Wisconsin
Massachusetts	Ohio	Wyoming
Michigan	Oregon	Alaska

The object of these acts is not to change, but to combine, the best features of existing laws in different states. Various

states sometimes adopt these acts with slight modifications, but for all practical purposes the law is uniform.

Our discussion of the subject of sales is based primarily on the Uniform Sales Act.

§ 130. Difference Between a Sale and a Contract to Sell.—In the Uniform Sales Act, we find these definitions:

"A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

"A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price."

An actual sale is sometimes called an "executed contract of sale," whereas a contract to sell is called an "executory contract of sale."

In an executory sale, the title or the ownership of the property does not change. In an executed sale, the buyer assumes the rôle of owner and all the resulting rights and liabilities. An executed sale may take place even though the goods have not been delivered. The buyer may accept the ownership but may arrange with the seller to leave the goods in storage. Delivery usually indicates that the ownership has passed; but delivery after all is not the important factor. The determining factor is the intention of the parties. Did they intend that the ownership of the goods should pass from the seller to the buyer or simply that the seller should become obligated at some future time to transfer his title to the buyer?

§ 131. Importance of Distinction.—Whether a given transaction is an executed sale or an executory contract of sale is frequently a matter of prime importance. The risk of loss resulting from fire, flood, or other cause is, of course, upon the owner. So if the ownership has changed hands, the buyer will have to suffer this loss even though he has not yet received the goods. An illustration of this is often seen in shipments

by a common carrier. A man in New York orders goods from Chicago. The usual rule is that the railroad company is the agent of the buyer. The result is that on delivery of the goods at Chicago to the railroad company, the goods pass into the hands of the agent of the buyer and consequently at that time they become his property. Accordingly if any loss or damage occurs in transit, the buyer is the proper party to make the claim against the railroad company and even though he fails to collect from the railroad company, he nevertheless would have to pay the seller for the shipment.

The same question of the risk of loss may come up where the goods have been selected by the buyer but left with the seller. If the title passed at the time of selection, as it often does, and subsequently the goods are destroyed before delivery to the buyer, the buyer nevertheless will have to pay the price.

The question of the transfer of title or the nature of the contract is also important in connection with the right of disposal. The owner of the goods, of course, has the right to dispose of them. If A selects a particular carload of fruit and pays part of the price and it is understood that the carload became his property at the time the contract was made he will be entitled to the selected carload, although to get it he will have to pay the balance of the price. If the seller refuses to give up the carload or relinquish the documents relating thereto, A can get a court order forcing him to do so.

On the other hand, if the ownership has not changed hands, the buyer cannot force the seller to deliver the goods. In that case, the buyer's only remedy is to sue for damages or to go out in the market and buy goods from somebody else and make the seller pay the excess above the contract price. Except under very exceptional circumstances, he cannot force the seller to comply with the contract.

§ 132. **Price.**—A contract of sale which does not mention a price is valid, because the court will assume that the goods are

to be paid for at a reasonable price and charge the buyer accordingly. Usually the reasonable price is the market price at the time and place of delivery.

If, however, an order is given for goods and the parties agree that the price is to be fixed later, there is no sale, or contract to sell, because the parties have left one essential of the contract for future agreement. Such uncertainty of price will invalidate the sale.

Sometimes the price is made dependent on outside circumstances, as for instance, the market price on the day of delivery; or it may be agreed that the price is to be fixed by a third party.

An inadequate or excessive price does not invalidate the sale. A man who makes a bad bargain need not expect any relief or sympathy from the court.

The general question of consideration has been very fully discussed in Chapter IX.

§ 133. **Existence of Subject Matter.**—Where the goods are in existence and are owned by the seller, he may, of course, sell all or any portion of the goods. Whether the sale is executed or executory depends upon the intention of the parties. For an executed sale, existing subject matter owned by the seller is a necessary and vital element. The seller cannot transfer the ownership of something which is not in existence or which he does not own. Consequently, when A attempts to sell to B some article which is not in existence, the transaction amounts merely to an agreement by A to sell the article to B when it does come into existence. Likewise, if A attempts to sell to B an article of which X is the owner, the transaction is not a sale, because A cannot, without X's consent, transfer the ownership of property belonging to X.

An exception to this principle is the doctrine of potential existence. This has been abolished by the Uniform Sales Act but it still survives in most of the states that have not adopted the Uniform Sales Act. The theory of potential existence

treats agreements to sell articles which are not in existence, but which in the ordinary course of nature will come into existence, as executed sales when the articles come into being or are produced. A farmer contracts to sell the offspring of animals or a future crop. As the subject matter is non-existent, all that the farmer has agreed to sell is an expectancy. The realization of the expectancy, however, is so highly probable that the doctrine of potential existence provides that the offspring at birth or the crops on ripening at once become the property of the buyer, just as they would if they had been existing when the farmer made his contract.

§ 134. **Destruction of Subject Matter.**—When the goods which the seller is offering for sale have been entirely destroyed without his knowledge at the time the agreement is entered into, the contract of sale does not take effect. When they have been partly destroyed, the buyer may refuse to take any of them, or he may take those which are left and pay for them at the contract price. If the goods were sold at so much a quart, a barrel, etc., he may pay for what he gets. If a lump sum was named for the entire lot, he must pay the entire amount, because the court will not attempt to split it up for him. To do so would be to make a new contract for the parties.

If there has been an actual sale and the ownership of the goods has passed to the buyer, the loss falls on him if they are destroyed without fault of the seller, even though they remain in the seller's possession. If the ownership still remains with the seller, the loss would fall on the seller, wherever the goods may be, even though on their way to the purchaser or in his hands.

Where the contract was not for any specific articles, but only for so many feet of lumber, bushels of wheat, etc., the destruction of the wheat or lumber which the seller had at the

time the contract was made would not excuse him from performing it. He must go out into the market and buy more to replace what was lost.

Where the contract is for a selected article, as for a particular painting, table, or goods that have been designated by special lot numbers, destruction of the subject matter excuses the seller from performance. He does not have to replace the destroyed subject matter with similar articles, because the contract is based on the existence of the particular subject matter selected.

§ 135. **Loss Due to Delayed Delivery.**—Where delivery is delayed due to the fault of one of the parties and the goods are partly or wholly destroyed, the loss must be borne by the party causing the delay, regardless of which party had title.

§ 136. **Forms of Sales Contracts.**—The contract of sale need not be in any particular form. It may be oral, unless it comes under the Statute of Frauds. (See § 152.) However, good business practice requires that the contract be written.

Many sales contracts are made by an interchange of letters, such as the following:

MOUNT HOLLEY IRON COMPANY
Ashfield, N. J.

November 26, 1925.

MR. RICHARD A. PERRY,
365 Amity Street,
Newark, N. J.

DEAR SIR:

Our company has on hand some thirty or forty tons of nut and bolt scraps which we shall be pleased to sell at $1.30 per hundredweight, terms 30 days, and deliver in Newark within five days after order. We will sell in lots of not less than ten tons.

Kindly advise at earliest convenience if you desire any or all of this material.

Yours very truly,
MOUNT HOLLEY IRON COMPANY,
By J. SHELDON,
Secretary

Newark, November 28, 1925.

MOUNT HOLLEY IRON COMPANY,
Ashfield, N. J.

GENTLEMEN:

In reply to your letter of November 26, I shall be pleased to take fifteen tons of the nut and bolt scraps you describe, at price and on terms named, provided same is delivered on or before the 4th of next month.

Yours very truly,
RICHARD A. PERRY

This sort of sales contract is extremely informal. In important transactions there should be a carefully drawn contract giving all details. The usual points to be covered are the following:

1. *Price and Terms.* If credit is granted, the beginning and expiration dates should be given. There should be an explicit statement as to which party is to bear shipping charges.

2. *Subject Matter.* The merchandise should be clearly described, both as to quantity and quality, and any warranties in connection with it should be set forth.

3. *Delivery.* It is well to fix the time of delivery.

4. *Title.* A statement giving the intention of the parties as to the passing of title will often prevent future controversies.

5. *Contingencies Clause.* (See § 84.)

Export sales contracts should be drawn with expert care so that due regard will be given to the laws and customs of the foreign country where the contract would have to be enforced in the event of any dispute or default by the purchasers. The drafting of such contracts should not be entrusted to domestic attorneys who are not familiar with foreign law but to attorneys who are specialists in international business law.

The following is an example of a type of export sales contract. The specifications appear on the face and the general terms and conditions on the back.

Export Sales Contract

Contract No. *117x* Date *November 11, 1925*

THE EXCELSIOR MILLING COMPANY
of Hutchinson, State of Kansas
United States of America

hereinafter called the Seller, sells, and

Jorge Gouzalez Capote

Caracas, Venezuela

hereinafter called the Buyer, buys, subject to the terms and conditions enumerated below and on the back of this contract, which terms and conditions are binding on both parties, and cannot be modified except by the written consent of both parties, the following merchandise:

(Descriptive Table)

Quantity (Bbl., Ton or Cwt.)	Commodity (Flour, Feed, etc.)	Packages		Brands	Price per Unit (Bbl., Ton or Cwt.)
		Size	Kind (Wood, Cotton etc.)		
196 lbs.	*Flour*		*Cotton Sacks*	*Corona*	*$7.10*

TERMS AND CONDITIONS

Terms of payment *90 days sight* draft with shipper's order bill of lading attached through *National City* Bank of *New York.*

The Buyer will be responsible until final payment reaches the Seller.

Time of Shipment from mill *December*

Destination or port *La Guaira, Venezuela.*

Routing *New Orleans.*

Seller shall have the option as to routing.

PRICES: Prices on this contract are fixed on the basis of C. I. F., the meaning of which is explained on the back hereof.

Terms and conditions of this Contract are continued on the back hereof with the same force and effect as if they were on the face hereof.

This Contract is subject to confirmation by the Seller at

THE EXCELSIOR MILLING CO.

By *Juan Hernandez*, Seller
Jorge Gouzalez Capote, Buyer

Confirmed by THE EXCELSIOR MILLING CO.

Date *11-30-25*

By *J. R. Thompson*

TERMS AND CONDITIONS (CONTINUED)

C. I. F. means that:

A. Seller must
(1) Make freight contract and pay freight charges sufficient to carry goods to agreed destination.
(2) Take out and pay for necessary marine insurance.
(3) Deliver to buyer or his agent clean bills of lading to the agreed destination, and insurance policy and/or negotiable insurance certificate, but seller is not responsible for the delivery of goods at destination, nor for payment by the underwriters of insurance claims.
(4) Provide war risk insurance, where necessary for buyer's account.

B. Buyer must
(1) Be responsible for loss and/or damage thereafter, and must take all claims to which he may be entitled under the insurance directly on the underwriters.
(2) Take delivery and pay costs of discharge, lighterage and landing at foreign port of destination in accordance with bill of lading clauses.
(3) Pay foreign customs duties and wharfage charges, if any.

GROSS WEIGHTS—Commodities covered by this contract are sold on the basis of gross weights when packed.

SHIPMENTS. (1) Delivery by the seller to the rail carrier at the initial point and the obtaining of a through rail and water bill of lading from the carrier shall constitute delivery to the Buyer, all carriers being considered as the Buyer's agents; and the Seller's responsibility shall cease upon delivery of the merchandise in good condition to the initial carrier, and claims for loss of goods shall be made by the Buyer against the carrier, and in case of damage during water transit, against the marine insurance company, but the Seller will, if the Buyer wishes, present any such claims in the Buyer's name. Although the risk of loss during transit shall be on the Buyer, and although shipment may bear the marks and name of the Buyer, it is understood that title to the shipment shall remain in the Seller until the Seller shall receive full payment.
(2) Prompt shipment means shipment from the mill within fourteen (14) days after receipt of order or shipping instructions; and immediate shipment means shipment from the mill within seven (7) days from the receipt of order, or shipping instructions.
(3) Each shipment shall be considered as a distinct contract, and failure to make any shipment in accordance with the terms and conditions of this contract shall be the ground for the refusal only of such shipment or shipments, and not for the rescission of the entire contract. The Seller may make partial deliveries, unless otherwise stipulated in the contract, and the Seller shall have the option to delay shipment or delivery, or to cancel all or any portion of its contract if the Buyer shall fail to make any payments due on this, or any other contract.
(4) The Seller shall not be responsible for failure to ship according to the terms and conditions of this contract where such failure is caused by fire, explosions, strikes, labor difficulties, lack of transportation, embargoes, conditions caused by war in any country, inability to get supplies and raw materials, or by any other cause or causes of any nature whatsoever beyond the control of the Seller.
(5) Any claim by the Buyer with regard to delay, defects in quality or quantity, or with regard to any other matter must be defined and fully determined before the Buyer takes possession of the shipment, and the taking possession of the shipment by the Buyer shall mean that the Buyer has carefully examined the merchandise on arrival, has found it to be free from any surface or hidden defects, and is satisfied with it and with the Seller's performance of this contract and waives the right to make any claim against the Seller.
(6) Upon the failure of the Buyer to furnish shipping instructions by the date named for shipment, or if no date for shipment is named within thirty (30) days after the date of the contract, or upon the failure of the Buyer to make any payment or to perform any other obligation under this contract, the Seller may exercise either of the following options:

A. Demand performance of the entire contract, and hold the Buyer responsible for any damages caused by the Buyer's default; or

B. Rescind the whole contract, or the portion on which there has been a default, and hold the Buyer responsible for any damages.

If the Seller exercises option A, the Seller shall be required only to make a legal tender of delivery on condition that the price of the merchandise be paid, and upon such tender being refused, the Seller may proceed to sell the goods at public auction or at private sale for the account of the Buyer, and hold the Buyer responsible for all damages, including all expenses and the difference between the contract price and the proceeds of the resale, and the Seller shall not be required to comply with the provisions of any law of the Buyer's Government requiring any judicial deposit, the Buyer hereby expressly waiving the benefit of any such law; and if the Seller shall exercise option B, it shall not be necessary for the Seller in order to establish damages, to ship or tender delivery, any law of the Buyer's Government to the contrary notwithstanding, the Buyer hereby expressly waiving the benefit of any such law.

AUTHORITY OF AGENTS AND ASSIGNMENTS—No agent or representative of the Seller has authority to modify or change the terms of this contract, or to give any warranty with regard to the merchandise sold or offered for sale, or to collect the price therefor. Assignment of this contract or change of destination to a point or points other than that named in the contract cannot be made without the written consent or approval of the home office of the Seller.

DISPUTES—In case any disputes arise in connection with this contract, they shall be settled by arbitration and not by legal proceedings. Each party shall appoint an arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator, and the decision of the committee of arbitrators shall be final. In such arbitration proceedings and also in any legal proceedings, if the parties shall mutually waive this arbitration agreement, strict legal rules of evidence shall not be exacted and affidavits duly legalized and final certificates of government officers, notaries, surveyors, and appraisers shall be accepted.

INTERPRETATION OF CONTRACT—In the event of any conflict between the English and Spanish versions of this contract, the English version shall govern.

The bill of sale, analogous to the deed in real property transactions, is used to show the transfer of title to personal property.

Be it known that Thomas Gray of Beaver Falls, Pennsylvania, in consideration of the sum of One Hundred and Seventy-Five Dollars ($175) paid by Allen Ruskin of Pittsburgh, Pennsylvania, the receipt whereof is hereby acknowledged, does hereby sell, transfer, and deliver unto the said Allen Ruskin the following goods and chattels, namely:

(*Itemized list of goods and chattels follows.*)

To have and to hold, all and singular, the said goods and chattels to the said Allen Ruskin, his representatives, and assigns to their use and behoof forever, and I hereby covenant that I am the lawful owner of the said goods and chattels, that they are unencumbered, that I have good right to sell the same, and that I will warrant and defend the title of the same against the claims and demands of all persons.

In Witness Whereof, I have hereunto set my hand and seal in Beaver Falls, Pennsylvania, this 30th day of December, 1925.

Thomas Gray [L.S.]

§ 137. **Regulations for Sales at Auction.**—A sale at auction is held in accordance with terms printed in the auction bills. The sale is made when the auctioneer lets his hammer fall. He need not accept any bid unless required to do so by the terms of the printed auction advertisement. Generally such an advertisement will specify that the property is to be sold to the highest bidder. An auctioneer may refuse to recognize bids that are not substantially higher than the last bid, the amount depending on the value of the article offered for sale.

If the seller had printed in the auction bill a provision that he reserved the right to take part in the bidding, himself, he might bid at the sale or have his friends do so for him. Otherwise if the seller, himself, bids, or has bids made for him, the person to whom the goods are finally "knocked down" may refuse to take them if he discovers the situation.

§ 138. **Compliance with Conditions.**—The sale may be made on some condition. The buyer must then comply with the condition before he can receive the goods. Sometimes bidders are required to make a deposit before being allowed to

bid; sometimes they are required to make a deposit after the bid is accepted. If the bidder does not comply with the terms of the sale he forfeits this deposit, unless he proves that the seller could not give him good title to the property, in which case he may recover his deposit and refuse to take the goods.

A purchaser at an auction sale must pay cash before he is entitled to the property, unless the terms allow credit.

The seller may sue the purchaser for damages if the latter fails to take property which was "knocked down" to him. The seller may also sell the goods to someone else for what he can get for them. This amount will be deducted from his damages.

§ 139. **Duties of Auctioneer.**—The auctioneer acts as an agent for the seller in selling the property; for the buyer in signing a memorandum of the sale. The seller will be bound to carry out the sale which the auctioneer makes, and the buyer to take the goods according to the memorandum of sale. An auctioneer is not allowed to bid for himself at a sale, but he may make bids for someone else. If he does not state for whom he is selling the property, he is personally responsible to the purchaser for seeing that the terms of the sale are carried out.

An auctioneer who sells property that does not belong to the seller is personally responsible to the owner of the property, even though he honestly thought it was part of the goods to be sold. Because of all this responsibility, the law usually requires an auctioneer to have a license. In New York a man must take out a license to act as auctioneer to sell even his own property.

The auctioneer has a lien on the property for his commission, and may require the commission to be paid him before giving up the property to the purchaser.

Review Questions

1. Is it desirable to have uniform state laws on all subjects that affect business?

2. What four laws have been made uniform in most states?
3. Define a sale and a contract to sell.
4. Distinguish between the two.
5. Why is it important in many cases to determine whether the transaction is an executed or an executory sale?
6. To have a sale, is it necessary that the price shall have been explicitly agreed upon?
7. Does an inadequate or excessive price have any effect on the agreement?
8. Is it possible to have an executed sale of articles not in existence?
9. How is the contract of sale affected by the fact that the goods mentioned had been destroyed previously?
10. What right has the buyer if the goods are partly destroyed?
11. If the sale had been completed before the damage occurred, what would be the result?
12. What is the effect of the destruction of a particular article contracted for?
13. Who bears a loss occurring through a delay in delivery?
14. May a man who owns goods being sold at auction bid on them himself?
15. What terms may be imposed at auction sales?
16. When does the bidder forfeit his deposit?
17. In what legal capacity does an auctioneer act?
18. May an auctioneer, himself, bid?
19. What lien has the auctioneer on the property he has sold?

CHAPTER XVIII

PASSING THE TITLE

§ 140. The Intention of the Parties.—The question of passing title is primarily a question of the intention of the parties. When do the parties intend title to pass? This is simply a question of fact, but it is in many cases very difficult to determine. Where the parties have expressed their intention clearly in the contract that intention will, of course, be followed. But where their intention is not clear, the following rules will be applied to determine their intention as to the time of the passing of title:

1. Where goods are picked out by the buyer, and, at the time the contract is made, are in the shape in which they are to be delivered, the buyer becomes the owner immediately.

2. Where something further remains to be done to the goods before they can be delivered, the buyer does not become the owner until that thing is done, and the goods are delivered to the buyer or at least are offered to him.

3. When a contract is made to sell a certain number, weight, or measure of goods or goods to be made up by the seller, the buyer becomes the owner when goods answering the description of the contract are delivered or with the buyer's consent otherwise appropriated to the contract.

4. When goods are delivered to the buyer on approval or on trial, the buyer becomes the owner when he signifies his approval to the seller or in some other way approves the transaction, or retains the goods beyond the time allowed for the trial or approval period, or, if no time is fixed, beyond a reasonable time.

§ 141. Importance of Selection.—It is impossible to transfer the ownership of goods that have not been identified or set aside. A contract to sell an automobile of a certain make does not transfer the title to any automobile until a particular automobile is designated as the subject matter of the contract. The precise article or articles that are to constitute the subject matter of the sale must be agreed upon. This means that the subject matter of the sale must have been selected. Usually the selection is made by the buyer, but in some cases the buyer directly or indirectly authorizes the seller to make the selection for him.

§ 142. Exceptions to Rule of Selection—Goods in Mass.—Where the shipment consists of a mass of uniform quality, such as flour, grain, wine, or oil, it is not necessary to have any selection because every particle of the mass is the same. The particular receptacle from which the goods are to be taken must be designated, however. So if a buyer orders 100 bushels of grain and designates the grain elevator from which the grain is to be taken, title to 100 bushels will pass without any separation. Whether the buyer's portion is separated from the whole at the time of the sale or later makes no difference, because in either case he will get exactly the same thing, as he becomes owner of his part or fraction of the unseparated mass. In case of loss, he will bear his proportion of the loss. Should there be a 50 per cent loss, he will have to accept the delivery of half the quantity he agreed to pay for and pay for the entire quantity ordered.

§ 143. Exception to Rule of Selection—Appropriation of Goods to the Contract.—An actual selection by the buyer is not necessary if the buyer has agreed that the seller may make an appropriation of goods to the contract. For instance, he may have directed the seller to set aside certain goods, pack up the goods, and mark the packing cases with the buyer's name. This would be a sufficient selection or appropriation.

Or again, suppose the buyer orders goods by mail or by telegraph. Here the buyer is ordering unselected goods. The selection, which is necessary to pass title, he authorizes the seller to make for him. The seller sufficiently indicates his selection or appropriation of the goods to the contract when he delivers them to the common carrier who is considered the agent of the buyer. Of course, the goods must be according to the contract; if they are not, they may be rejected by the buyer. So in the ordinary case, a proper delivery to the common carrier means delivery and transfer of title to the buyer. The parties may change this rule by a special contract or the seller may in some customary way indicate that he reserves the ownership of the goods until payment.

§144. **Delivery.**—Selection rather than delivery is the vital factor in determining whether or not title has passed. In many cases where the buyer actually selects the goods, the title passes to him at the time of selection and in advance of delivery. Where there is any question, however, as to whether or not title passed, the fact that the goods were actually delivered to the buyer is strong evidence of a change of ownership, because ordinarily a seller will not surrender possession of goods unless he is willing to divest himself of their ownership.

If the seller is required to deliver the goods to the buyer or to a particular place, title will not pass until the goods have been delivered to the buyer or have reached the place agreed upon.

In the absence of any agreement between the parties, the place of delivery will be the seller's place of business, if he have one, and if not, his residence. However, where specific goods are sold and these are known to be in some other place, as a warehouse, lumber yard, etc., such place is the place of delivery.

When no time is fixed, delivery should be made within a reasonable time. It must be made or tendered at a reasonable hour.

In the case of bulky goods such as coal or pig iron, an offer to deliver is tantamount to delivery.

The shipping terms are important. If goods are shipped from Detroit and the shipment reads, "f.o.b. New York," this means that the shipper or seller must get the goods to New York and pay the transportation charges to New York; f.o.b. simply means "free on board" at the point named. Where the shipment is f.o.b. destination, the title does not pass until the goods reach their destination; but where the shipment is f.o.b. shipping point, it passes to the buyer when the goods are put in the hands of the common carrier.

C. O. D. of course means "cash on delivery." Whether or not title passes in this case on shipment depends upon the law of the state where the transaction arises. Under the Uniform Sales Act, this term indicates simply an intention by the seller to preserve his right to withhold actual delivery until he receives payment. In other words, where the Sales Act prevails, the seller in using this term transfers title but directs the common carrier not to make actual delivery until payment is made.

If the seller has the bill of lading made out to the buyer or to the order of the buyer, this indicates that the seller intends to pass title to the buyer. But if the seller has the bill of lading made out to himself or to his agent, this indicates that he does not divest himself of title. Where the seller desires to protect himself by the form of the bill of lading, he has it made out to his own order, attaches to it a draft or bill of exchange drawn on the buyer, and then gets a bank to discount the draft. The seller, of course, indorses the bill of lading to the bank. Then the bank holding the indorsed bill of lading is able to control the disposition of the goods. The bank or its agent in the city where the goods are to be delivered will not surrender the bill of lading until the draft is paid. In the meanwhile, the buyer cannot get possession of the goods because he does not have the bill of lading.

§ 145. **Sales Without Delivery.**—Whether or not there has been a transfer of title, it is always risky to leave property in the seller's possession. The very fact that it is in his possession is apt to mislead innocent third parties who have no notice of the sale. If the seller should be dishonest and sell the property again, there would be no chance of recovering it from any third party to whom he sold or pledged it. This is the rule in California, Colorado, Connecticut, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, and Washington. The laws in the above states regard leaving the property with the seller as opportunity for fraud on other persons; hence, the party who so left the property must lose if the goods are sold to an innocent buyer. This is just, for, if a man has property in his possession, it is fair to assume that it is his, and if he sells it again the new buyer should be protected.

Where for any reason possession is to be left with the seller, the only safe method for the buyer is to take a formal bill of sale and to file it on record in the proper office of registry for the locality.

§ 146. **Necessity of Title in Vendor.**—The general rule necessarily is that only the owner or his authorized agent can pass title. Unless this were the rule, there would be no real protection for the ownership of personal property. Hence a purchase from one not the owner carries with it no better title than the seller possessed: all the buyer can get is what the seller had to give. Even the "innocent purchaser for value" is not immune from this harsh test. The average layman thinks that such a purchaser stands in a class by himself and always gets good title. This is grossly misleading: good faith does not create title.

However, the innocent purchaser will be protected in the following exceptional situations:

1. Money or negotiable instruments payable to bearer, if stolen, lost or diverted, will be good in the hands of an innocent purchaser.
2. Where the requirement of recording, as in the case of conditional sales in most states, has been neglected, the bona fide buyer who gives consideration will get good title. (See § 148.)
3. Where the true owner is estopped to assert ownership, because he gave another the indicia of ownership or allowed another to act as owner, and a third person purchased the goods in reliance upon such apparent ownership.
4. The factor's acts, which have been adopted in many states, provide that one who has been entrusted with the possession of goods for the purpose of sale or with negotiable documents of title, such as a negotiable bill of lading or warehouse receipt shall be regarded as the true owner so far as to give validity to any sale or pledge of the goods to another who acted in good faith and gave value.

§ 147. **Purchase Where Title Voidable.**—One who holds personal property under a voidable title, although liable to have his title extinguished, can pass on good title to an innocent purchaser for value. In the hands of such a purchaser the title cannot be avoided. Hence title acquired by fraud or from a minor or an insane person may be reclaimed but not if the first purchaser has resold to an innocent purchaser for value.

§ 148. **Conditional Sales.**—It is possible for the seller to give the purchaser possession of the article that has been sold, and still to retain the ownership himself until the full price or a certain amount of the price has been paid. This can be done only by agreement, however, and where sales are made on the instalment plan it is very common to provide in the agreement of sale that the ownership shall not pass from the

seller to the buyer until the last instalment has been paid. Such sales are known as "conditional sales."

The law always enforces such an arrangement as between the buyer and the seller. For the sake of ready proof and avoidance of misunderstandings, the contract should be in writing. The usual plan is for part payments to be made as rent, with a proviso that the title passes to the purchaser when the last instalment is paid.

The difficulty arises from the fact that, as the buyer has the property in his possession, third persons are apt to be misled into believing that he owns it and has the right to dispose of it. Most of the states get around the difficulty by providing that the seller must file the contract in an office of public record. Everybody is then required to know that it exists, as in the case of a mortgage. If the seller does not put the contract on record, and the buyer is dishonest enough to dispose of the property to a third person who had no knowledge of the seller's rights, the seller loses the property.

§ 149. **Form of Conditional Sales Contract.**—The following agreement, designated as a lease, is in reality a conditional sales contract:

This agreement certifies that Harry D. McKay, the undersigned, now living at 136 Park Place, New Rochelle, New York, has received from the W. H. Cary Manufacturing Company, a corporation under the laws of New York, one second-hand Dodge automobile, returnable on demand, in good order and repair, and valued at Five Hundred and Forty Dollars ($540). This the undersigned agrees to use with care and keep in good order and condition, and he agrees to pay for the use of it as follows:

On delivery of said property, One Hundred Dollars ($100), which shall be accepted as payment for rent until March 1, 1926, and then he shall pay at the rate of Twenty-Five Dollars ($25) per month in advance on the first day of each and every month, without notice or demand, at the office of the said W. H. Cary Manufacturing Company, No. 485 Adams Street, Brooklyn, New York. If default be made in any of the payments so provided, or in case the undersigned shall sell, offer to sell, remove, or attempt to remove said property from under his custody or control without the consent in writing of the said W. H. Cary Manufacturing Company then this lease shall cease and terminate, and the said W. H. Cary Manufacturing Company, or its agent, is authorized to take actual possession of said property wherever the same may be.

It is further agreed that the undersigned may at any time within said rental period purchase the said automobile by paying the named valuation

therefore, and in that case the rent theretofore paid shall be deducted from the purchase price. If any instalment of rent is not paid when due, or if said property is not returned upon demand, the undersigned agrees to pay an attorney's fee of Twenty-Five Dollars ($25) in case his lease is placed in the hands of an attorney for collection of said rent, or to recover possession of the said automobile.

HARRY D. MCKAY

New Rochelle, New York,
January 10, 1926.

Attest:
HENRY SMITH

§ 150. **State Laws on Conditional Sales.**—In the following state conditional sales are good against third parties without acknowledgment or filing:

Arkansas	Louisiana	New Mexico
California	Massachusetts	Oregon
Delaware	Michigan	Rhode Island
District of Columbia	Mississippi	Tennessee
Idaho	Nevada	Utah
Indiana		

Those states which demand a record require different formalities to permit the contract to be put on record.

The contract recorded is merely required to be signed by the purchaser in the following states:

Alabama	Minnesota	Texas
Arizona	Montana	Vermont
Kansas	New York	West Virginia
Maine		

Some states require in addition an affidavit by the seller stating the nature of the sale. In others, if the contract is signed by a witness, the witness may prove it; but in most of the states the contract must be acknowledged by the buyer.

§ 151. **Effect of a Conditional Sale.**—In the case of a conditional sale, properly registered, the ownership remains in the seller until the full purchase price has been paid, or, if the agreement of sale stipulates that title should pass on the payment of a smaller amount, until that has been paid. Where

the purchaser fails to make the agreed payments, the seller is entitled to the property. If it is not surrendered peaceably, he may have to resort to legal proceedings to recover possession.

Review Questions

1. What rules are applied to help determine the intention of the parties as to the passing of title?
2. Explain why selection must precede the transfer of the ownership of goods.
3. If the goods sold consist of flour or grain, is it necessary that there be a selection before the title passes? Why?
4. When goods are ordered by mail, when does the title to the goods shipped pass to the buyer?
5. Give other illustrations of the seller's appropriation of the goods to the contract.
6. If a man goes to a clothing store and selects an overcoat, which the store as a matter of convenience to him agrees to hold for a week when he is to call for it, and then the store and its contents are destroyed by fire within the week, will the man have to pay the price of the overcoat?
7. Would it make a difference in the last case if alterations were required on the overcoat?
8. If a person takes a musical instrument on a ten-day trial period and carelessly neglects to return it within the ten days as he intends to do, will he be liable for the price of the instrument?
9. How is the question of the passing of the title affected by the matter of delivery?
10. Explain fully the meaning of the term "F. O. B."
11. In case the goods are shipped C. O. D. when does the title pass?
12. In shipping goods to a buyer in another city, how can you provide that the goods shall not be turned over to him until he has paid for them? How would you make out the bill of lading?
13. Why is it risky to leave goods in the possession of the seller?
14. What is the only safe way of leaving the seller in possession?
15. In what cases will the law protect an innocent purchaser for value who buys from one who has no right to sell?
16. What do the factor's acts provide?
17. What is a conditional sale? In such case, who owns the goods? Who has possession of the goods?

18. How is trouble likely to arise in cases where the buyer has possession of goods he does not own?
19. What is the usual method of making a conditional sale safe?
20. What are the usual formalities to protect the seller in making a conditional sale?
21. What may happen if the property sold is destroyed before payments are completed?

CHAPTER XIX

THE STATUTE OF FRAUDS

§ 152. When the Contract of Sale Must Be in Writing.— The Statute of Frauds, discussed in § 65, applies to sales where delivery is to be made later and where the value is over a certain amount. This amount ranges from $30 in Arkansas, Maine, and Missouri; to $500 in Arizona, Massachusetts, New Jersey, and Rhode Island; and $2,500 in Ohio. Fifty dollars is usual.

The words "in value" apply where the Uniform Sales Act has been passed. In the old statute the words were "in price."

The price is the amount fixed by the parties themselves; the value, what the goods are actually worth in the market.

In order that a sale above the limited amount may be enforceable, a written memorandum of the terms of the agreement must be signed by the party against whom it is sought to enforce the contract, or his agent.

The memorandum of sale required by the Statute of Frauds need not be formal. It may be a note, a letter, a telegram, a receipt, or may consist of several papers so connected as to make an intelligible sales contract. The memorandum need not be made at the time of the contract, but it must state all the material facts, the parties, the price, if a price was agreed upon, and specify the articles to be sold. It must be signed by the party, or by the agent of the party whom it is desired to hold. It may be signed by the broker who represented both parties in the transaction. In that case it is called a "bought and sold" note. The following is an example:

New York, April 25, 1908.

Sold for account of Bayou City Rice Mills.
To Mess. A. S. Lascelles & Co.

Marks	Barrels	Pockets
#157		3000 Rice at 3c per lb. F. O. B. Houston, Texas.
		Packed in double pockets.
		Immediate shipment, no insurance.

Terms Net Cash, S/D attached to B/L privilege of examination.

A. P. Topping & Co., Brokers

There are two exceptions to the rule that a sale above the minimum amount must be made in writing, or supported by a memorandum. These exceptions are:

1. Where the buyer has paid part of the price, or
2. Where the buyer has accepted and actually received part of the goods.

§ 153. **Exception for Part Payment.**—A payment makes the contract enforceable, though it may be above the limited value. The payment may either be a part of the price, or something given or paid to "bind the bargain." This should, strictly speaking, be in addition to the purchase price. In England this earnest is no part of the price of the goods. Usually in this country it is part of the price. The amount is not material.

Under the Sales Act the payment may be made at any time; under the common law, when the contract is made.

Driggs v. Bush, 152 Mich. 53, 115 N. W. 986, 15 L. R. A. (N. S.) 654

P, under an oral agreement to buy D's hay and to do the baling, had his laborers bale the hay. The regular price for baling was $1.10 per ton. Upon D's refusal to deliver the hay, P sued for damages and D set up the Statute of Frauds.

Held: For P. There was no delivery, but the service of baling the hay, in pursuance of the contract, was a part payment. It is not necessary that payment be in money.

§ 154. **Exception for Part Delivery.**—The second case mentioned in § 151 was: "Where the buyer has accepted and

[1] Taken from the case of Standard Milling Co. *v.* De Pass, 154 App. Div. (N. Y.) 527.

actually received part of the goods." The word "received" means taken into actual physical possession; the word "accepted" means that the buyer must have indicated his decision to become the owner of the goods. Both conditions must be fulfilled to make the contract enforceable. The buyer may show his consent to become the owner of the goods either by his words or by his conduct.

The "part of the goods" must be taken out of the actual amount of the goods to be delivered. Samples or specimens which are not included in the buyer's share are not "part of the goods."

§ 155. Sales for Amounts Below Specified Value.—Contracts of sale below the minimum established by the law need not be in writing. If the transaction were below the value set in any particular state, suit could be brought on an oral contract; i.e., a contract not in writing. If it were proved, it could be enforced, but an oral contract is always hard to prove.

If the contract of sale is above the minimum value, suit cannot be brought upon it unless it is in writing. If the parties to such a contract (not in writing) carry it out, it becomes an executed sale and stands, as does any other sale, but if either party refuses to carry it out, the other cannot enforce it at law.

A single contract for the sale of a number of articles, each of which is below the limited amount in value, must nevertheless be in writing if the value of all together is greater than that amount.

§ 156. Contract for Work or Services.—If the article purchased involves work or services which make it suitable only for the original buyer, the contract may be oral. For example, a man goes to a dentist and orders a set of false teeth. The dentist takes some porcelain and other materials worth very much less than $50 and out of them makes a set for which he charges considerably over $50. His work and skill are

what give the teeth their value, and the teeth which are made for one man cannot be sold to another. In such a case the law says it is the dentist's services, not the materials, for which the man is paying, and the contract is not one of sale and need not be subject to any of the conditions mentioned in § 152. That is, the dentist can bring suit without a written contract.

Under the Uniform Sales Act, the test as to whether or not a contract is for services or for the sale of goods is this: "If the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business," the contract is for services; otherwise, it is a contract of sale. This is fair to the seller, because if the goods can readily be sold to others, he can, on the buyer's failure to take the goods, easily sell the goods to someone else and in that way will not lose much; whereas if the goods are made up on special order for the buyer so that they cannot be easily sold to anyone else, the seller is allowed to recover the contract price from the buyer.

Under the Sales Act, the fact that the goods are not in existence or that they are to be prepared or manufactured by the seller, is not important. The test applied is that given in the preceding paragraph.

The existence of the goods, however, was the vital factor in what was known as the "New York rule" before New York State adopted the Sales Act. This rule was that if any work was to be performed on the article to put it in shape for delivery, the contract was not a sale but a contract for work and services. The English rule is that if any article is to be made as a result of the work and services, the contract is one of sale. Either of these two rules may still apply in the states which have not adopted the Uniform Sales Act.

Review Questions

1. What is the usual minimum amount of a sale above which the Statute of Frauds applies?

2. By whom must the memorandum be signed? Why is it desirable to have both parties sign?
3. What actions of the buyer will make a memorandum of the contract unnecessary?
4. What effect has part payment?
5. What effect has part delivery?
6. Is there any reason why a contract of sale for an amount less than is specified by the Statute should be in writing?
7. If both parties carry out the contract, does it matter whether or not it was written?
8. If the agreement is for services, does it have to be in writing?
9. What is the test to determine whether a contract is for the sale of goods or for the rendering of services?

CHAPTER XX

WARRANTIES

§ 157. **Definition.**—The definition of a warranty in the Standard Dictionary is: "An assurance or undertaking by the seller of property, express or implied, that the property is or shall be as it is represented or promised to be as to quantity, quality or title."

If a farmer goes into an agricultural warehouse and asks to look at mowing machines, and after having inspected its stock and obtained prices to his satisfaction, says he will take the one which he has selected, he has assumed the responsibility for its fitness himself and has no recourse as to the seller for damages afterward if it should prove unsatisfactory. The court would apply the maxim *caveat emptor*, the ancient and harsh doctrine of the common law, signifying, "let the buyer beware." The common law originally took a sporting view of the dealings between buyer and seller, and did not wish to discourage skill in barter by stressing any ethical considerations.

At the present day, however, both law and trade morality have advanced a long way beyond this primitive conception of the rights of buyer and seller. Nearly all trade transactions are now based on certain contract conditions, expressed or implied, by which the risk to the buyer is largely eliminated. A change of property for a consideration rarely takes place without some conditions or warranties as to quality, utility, or other characteristics of the commodity sold.

§ 158. **Express Warranties.**—An express warranty is a statement made by the seller about the quality, durability, working ability, etc., of the article sold in order to induce the buyer to purchase. The purchaser must have bought the goods in

reliance on that statement. If he relies on his own judgment and selects the goods himself, there is no warranty even though the seller makes a statement of fact.

Any statement of fact or any promise by the seller in regard to the quantity, quality, or title of a commodity is an express warranty, if the natural effect of such a statement is to induce the buyer to purchase the goods, and if the buyer does purchase the goods relying on such statements.

The buyer must be on the lookout to distinguish between statements of fact and expressions of opinion. Many prospectuses are cleverly worded to give the impression of being statements of fact, while still permitting the companies floating them to escape legal liability. Any such phrase as "it is estimated," "it appears," "there seems to be," "experts estimate," etc., or any phrase which qualifies the simple statement of fact, makes the assertion a mere worthless expression of opinion.

If a merchant tells you that his goods are the best on the market, this is not an express warranty, as it amounts merely to his opinion of them, and is what is called "merchant's puffing." If, on the other hand, he makes a direct and definite statement that these goods will wear a certain time, his statement is an express warranty.

It is always well to get a warranty in the most definite terms possible, for if a merchant is really willing to warrant his goods he will not be afraid to say so in plain language if the buyer insists upon it. If the merchant is not willing to make a definite warranty, it is better for the buyer to know it beforehand and to realize that he is relying on his own judgment and can claim nothing from the merchant in case the goods prove unsatisfactory. Moreover, a written warranty prevents forgetfulness on the part of the seller.

Morley *v.* Consolidated Mfg. Co., 196 Mass. 257

D's agent in selling an automobile to P stated that the automobile had been used by him personally as a demonstration car and run about

500 miles only, and that it was in first class condition, and that if new it could have been sold for $1600. P bought it for $900, receiving receipted a bill reading "1 second Yale Touring Car, $900." The crank shaft broke after D had used the car two months.

Held: For D. There was no express warranty as the agent's statements as to the value and nature of the machine were seller's talk. Nor was there any implied warranty as to the durability of the crank shaft.

The offer contained in the following letter, would, if accepted, constitute an express warranty:

THE BENEDICT WAGON COMPANY,
Columbus, Ohio

December 15, 1925.

MR. JOHN E. COURTNEY,
Mount Adams, Ohio.

DEAR SIR:

We have received your letter making inquiry as to our platform spring wagons shown in catalogue heretofore sent you.

Our No. 530 Standard is well made and has the best quality of wood and steel in every part. We will warrant it for one year to carry loads not in excess of four tons, anywhere on a country road, if drawn by two horses. We will warrant the springs and running gear against any flaw in material in workmanship for five years after purchase. The price is $250, and, if you desire, it can be paid half down and the balance by your note at one year.

May we ship you the wagon?

Very truly yours,
THE BENEDICT WAGON COMPANY

§ 159. Conditions.—There are two kinds of conditions. One is called the "pure condition." It is based upon the happening of some event over which neither of the parties has any control. For example, a contract is made to manufacture goods if a certain proposed law is passed, or a contract is made to buy goods coming from some foreign country "on arrival." In both of these cases, neither of the parties would be bound unless the conditions were carried out.

The other kind of condition is what is called the "promissory condition." Examples of this are stipulations in sales contracts that the goods will be delivered on a certain date or that they will be of a certain make or description or will fulfill certain specifications.

Where the Sales Act does not apply, both of these classes of conditions are recognized. But where the Sales Act applies, the second class, that is, the promissory conditions, are treated as warranties.

It is also to be noted that when the Sales Act applies, warranties are in reality given the same effect as conditions, that is, the remedy for breach of warranty is the same as the remedy for breach of condition. Where the Sales Act is not in force, the buyer, on suffering a breach of warranty, will have to be content with securing damages and will not be allowed to return the goods; whereas if he could prove a breach of condition, he would in that case have his choice of these two remedies.

§ 160. **Implied Warranties of Ownership.**—In every sale today there are certain implied warranties which the law compels the seller to make good. In regard to his right to sell the property, he warrants by the mere act of selling goods:

1. That he has a right to sell the goods, or, if it be a contract of sale, that he will have the right to sell them when the time for the sale arrives.
2. That the buyer shall not be disturbed by any claims made by others against the goods.
3. That the goods are free from any claim, charge, or incumbrance at the time of the sale.

These warranties do not apply to sheriff's sales and auction sales. There the buyer takes the risk that the article may be claimed by someone else.

If the seller sells stolen goods, the buyer will be forced to return the goods to their rightful owner, but he may then turn around and recover the amount of his damages from the seller.

In this case, the buyer, even though he is entirely innocent of any knowledge of the theft will not be allowed to keep the

goods because he has no legal title to them, inasmuch as he purchased from one who had no title to transfer; whereas if the seller had obtained the goods with the consent of the rightful owner through fraudulent misrepresentation, the buyer, who is ignorant of the fraud, would be allowed to keep the goods. In such a case, the goods are transferred from the original owner to the seller by a contract which gives the seller a voidable title. So the seller can convey some title, which in the hands of an innocent buyer is considered as a perfect title, because the original owner gave up his property voluntarily and enabled the seller to get money from the buyer on the strength of his apparent perfect ownership.

§ 161. **Implied Warranties of Quality.**—There are two other warranties which go with a sale of goods even though nothing is said about them.

1. If the buyer makes known to the seller the purpose for which he intends to use the goods and the fact that he is relying on the seller's skill or judgment, there is an implied warranty that the goods furnished will be fit for the purpose. For instance, in a certain case, a buyer notified the seller that the automobiles he was ordering would be used in a hilly district and for heavy traffic. The court held that there was an implied warranty that the automobiles furnished would be fit for the work intended.

A very common illustration of this is buying food for immediate consumption. Whenever we go into a market or grocery store to buy food, the butcher or the grocer knows, of course, why we are buying it; there is therefore a warranty that the food will be fit to eat.

2. If the goods are bought by description from a person who regularly deals in that kind of goods, there is a warranty that the goods furnished will be merchantable, that is, of average quality. When we buy goods from a dealer and do not see the goods at the time of purchase, if, for example, we order

from a catalogue or by mail or telegram, we naturally expect the dealer to furnish us goods of average quality.

When a buyer orders goods by their trade-name (Quaker Oats, Ivory Soap, etc.) the seller is not held to any warranty that they are fit for the buyer's purpose. As the buyer is ordering a known article, he is obviously not relying upon the seller but is using his own judgment.

When a person orders goods from the description in a sales catalogue or from a sample, there is also an implied warranty that the goods furnished will be similar to the description or to the sample.

The seller is liable for damages to the buyer if any of these warranties are broken. He is liable only to the immediate buyer, however, and not to other persons to whom the buyer sells the goods. An exception to this last statement is in the case where the goods manufactured are of such a nature that they will, if defective, be imminently dangerous to life and limb. If such goods are actually defective and cause an injury to some third party, the manufacturer will be liable to the third party.

Flynn *v.* Bedell Co., 242 Mass. 450

P, a woman unfamiliar with furs, purchased a fur collar from D's saleswoman who stated that it was black fox and not a dyed fur. The collar was dyed and caused D to suffer from a skin disease. P sued for damages for breach of an implied warranty of fitness.

Held: For P. An express warranty does not exclude an implied warranty. Here there was an implied warranty that the collar was it be worn around the neck.

Review Questions

1. What is the meaning of the term "warranty"?
2. Is it desirable to secure a warranty?
3. As to what matters may warranties be given?
4. Should a merchant sell goods if not willing to warrant them as to quantity, quality, and title?

5. If a buyer relies on his own judgment, will any statements made by the seller be construed as warranties?
6. What is the difference between a warranty and a statement of opinion?
7. What is an express warranty?
8. If a warranty turns out to be untrue, what can the buyer do about it?
9. What is the difference between a pure condition and a promissory condition?
10. Does the Uniform Sales Act make any distinction between warranties and conditions?
11. Where the Uniform Sales Act does not prevail, what distinction is made between warranties and conditions?
12. What is the difference between an express warranty and an implied warranty?
13. What are the implied warranties of ownership?
14. Can anyone get or give good title to stolen goods?
15. How does the statement of the purpose for which the goods are bought affect the sale?
16. What circumstances are necessary to constitute an implied warranty that the goods will be fit for the purpose desired?
17. Under what circumstances does the implied warranty of merchantability arise?
18. What warranty is attached to a sale by sample?
19. Why is a written warranty better than an implied one?

CHAPTER XXI

REMEDIES

§ 162. Rights of Unpaid Seller Under the Contract.—Most breaches of contract in cases of sale arise from the failure of the buyer to make the required payments. In such cases the goods may be in the possession of one of the following three parties:

1. The unpaid seller may still have the goods in his own possession; or
2. They may be in the possession of a railroad, a steamship, or an express company for the purpose of shipment to the buyer; or
3. They may be in the possession of the buyer himself.

The chief rights of the unpaid seller are the following:

1. To keep the goods in his possession until he collects the price. This is the "seller's lien."
2. To reclaim possession of the goods from the common carrier. This is called "stoppage in transit."
3. To rescind the contract of sale.
4. To sue the buyer for the price of the goods.
5. To sue the buyer for damages.

§ 163. Seller's Lien—When Available.—The seller's lien is the right of the unpaid seller to retain possession of the goods and to refuse to deliver them to the buyer until the price is paid.

A seller who has received a check retains his lien until the check is paid; although he would waive it, if he accepted the check as payment. A note or trade acceptance, in the absence of an agreement that it be regarded as security only, would be considered as conditional payment; but if the instrument became

overdue while the seller still had the goods in his possession, he could exercise his seller's lien.

This right is available even if the title has passed to the purchaser and the seller is holding the goods only as bailee. It may be used in the following situations:

1. A cash sale. The terms may provide for cash; or if nothing is stated as to payment, cash on delivery is presumed.
2. A credit sale after the period of credit has expired. In a credit sale, the contract requires the seller, except in the case of the buyer's insolvency, as explained below, to deliver the goods in advance of payment. But if the agreed credit period expires before delivery, the sale then becomes a cash sale and the seller's lien may be resorted to.
3. A credit sale where the buyer becomes insolvent. Credit is based on the presumed solvency of the buyer. If he becomes insolvent, the credit may be canceled. Otherwise, "one man's goods would be taken to pay another man's debts."

§ 164. Seller's Lien—When Not Available.—The seller's lien is lost by delivery of the goods or by a waiver of the right of lien.

This lien is dependent upon possession. Hence if the seller delivers the goods to the buyer or to his agent, he surrenders his lien. Delivery to a common carrier will end the lien (unless the seller has the bill of lading made out to himself or to his agent), but the seller may still retain control of the goods through the right of stoppage in transit.

The seller may waive his lien. The waiver may be express or implied. If the seller stands by and permits the buyer to sell the goods to a third party, the seller's failure to speak would constitute a waiver.

Rummell v. Blanchard, 216 N. Y. 348

P sold A & Co. 200 cases of shellac which were in a storehouse. P endorsed and delivered to A & Co. negotiable warehouse receipts for the shellac. The sale was on credit. Before the credit period expired, A & Co. became insolvent and P claimed to be entitled to the shellac.

Held: P lost his lien by indorsing the negotiable warehouse receipts to A & Co. Such receipts are symbolical of possession and the holder thereof has the right of possession.

Douglas v. Shumway, 13 Gray (Mass.) 498

X had bought standing timber from D and with D's permission had cut the timber into firewood. This X sold to P. Upon X's becoming insolvent, D removed the firewood on the ground that he had a lien and P brought a replevin action to recover the firewood.

Held: For P. D lost his lien when he allowed X at his own expense to change the character of his property and to add to its value.

§ 165 Stoppage in Transit—When Available.—The Sales Act provides in § 57 that "the unpaid seller may upon insolvency of the buyer, resume possession of the goods at any time while they are in transit, thereby becoming entitled to the same rights as to the goods as though he had never parted with possession."

This right can be exercised only while the goods are still in transit. When the transit ends is sometimes difficult to determine. If delivery is made to a forwarding agent, who has instructions to forward the goods to their ultimate destination, the transit continues; but if he is to hold the goods and await instructions, the transit has ended as far as the seller is concerned.

If the buyer rejects delivery by the carrier, the transit continues.

The issuance of a non-negotiable bill of lading to the purchaser will not affect this right of stoppage, because the transferee, taking the instrument by assignment, is subject to all rights that may be exercised against the transferor.

§ 166. Stoppage in Transit—When Not Available.—This right is not available in the following cases:

1. If the carrier has delivered the goods to the buyer or his agent at the destination named.
2. If the carrier, after the arrival of the goods at the appointed destination, acknowledges to the buyer or his agent that he holds the goods as bailee of the buyer.
3. If a negotiable bill of lading was issued to the buyer and negotiated by him to a purchaser in good faith.

§ 167. Stoppage in Transit—Position of Common Carrier.—The common carrier must accept the instructions of the shipper to stop the shipment in transit. If he fails to do so and delivers the shipment to the buyer, he will be liable for all damages resulting. However, he is entitled to a reasonable time to locate the shipment and to transmit the necessary instructions.

If a negotiable bill of lading has been issued, the carrier should not deliver the shipment to the seller, unless the bill of lading is surrendered to the carrier.

§ 168. Seller's Right to Rescind.—The Sales Act provides that the unpaid seller who has a lien or who has stopped the goods in transit, may rescind the sale and resume the title in the following cases:

1. Where the seller expressly reserved the right to rescind in the event of the buyer's default.
2. Where the buyer has been in default in the payment of the price for an unreasonable time.

It will be noticed that the buyer's default in payment does not give the seller the right to rescind it: it is only when the default has continued for an unreasonable time, that the right to rescind accrues. The seller must either, by notice or by some overt act, manifest to the buyer his intention to rescind. It is always safer to give explicit notice to the buyer.

By rescission, as explained above, the seller does not lose

his right to damages. On the contrary § 61 of the Sales Act specifically provides that the seller may recover any damages occasioned by the buyer's breach.

Another section (§ 65) of the Act provides for a total rescission, but this ordinarily will not be advantageous to the seller because it involves the relinquishment of any claim for damages.

§ 169. Seller's Action for Price.—If the goods have been delivered, the seller's only remedy will be to sue for the agreed price, or, if no price was agreed upon, the market price. It is only in the case where the buyer has obtained the goods by fraud that the seller has the right to reclaim possession of the goods from the buyer by a replevin action.

In most of the states that have not adopted the Sales Act, the seller may sue for the price in any case. The Sales Act has restricted this right and provides that it is applicable only in the following cases:

1. Where the title to the goods has passed to the buyer.
2. Where the contract calls for payment of the price on a specified date.
3. Where the goods are not readily resaleable for a reasonable price. To sue for the price on this ground, the seller must tender delivery and upon the buyer's refusal to take the goods notify him that the goods are being held by the seller as his bailee.

§ 170. Seller's Action for Damages.—If the buyer has refused to accept the goods, the seller may have the right to sue for the price as explained in the previous paragraph. This means that the seller must retain the goods and therefore cannot get any money until and unless he secures and collects a judgment against the buyer. The seller may prefer to dispose of the goods and sue the buyer for any resulting loss. Or

if it is a case where suit for the price is not allowable, the seller's only remedy will be to sue for damages.

The rules for determining damages are well classified in the following opinion by Sanborn, J. in Kingman & Co. *v.* Western Mfg. Co., 92 Fed. 486:

> "1. The measure of damages for a breach of contract to purchase personal property is the difference between the market value and the contract price of the property at the time of the breach, if the latter be greater than the former.
>
> 2. The same rule is applicable to the measure of damages resulting from the failure to accept articles which have been made and are ready for delivery at the time of the breach by the purchaser of the contract to purchase goods of a manufacturer, but it is not the true rule for the measure of damages resulting from the breach on account of those not then made and ready for delivery.
>
> 3. Where materials have been purchased and labor has been bestowed upon such articles under such a contract before the manufacturer has notice of the breach, his damages on these articles are the difference between the amount it would cost him to make and deliver them and their contract price, if greater, plus the difference between the value of the partly manufactured articles and the cost of the labor and materials that had been bestowed upon them at the time of the breach, if the cost be greater than the value.
>
> 4. If materials have been purchased with which to fulfil the contract, but no work has been bestowed upon them at the time of the breach, the measure of the manufacturer's damages upon the articles which might have been made with such materials under the contract is the difference between the amount it would cost him to make and deliver them, including the cost of the materials, and their contract price, if greater, plus the difference between the cost and the market value of the materials that have been purchased at the time of the breach, if the market value be less than the cost.
>
> 5. The measure of the damages upon articles covered by such a contract for which no materials had been bought, and upon which no work had been expended at the same time of the breach, is the difference between the amount it would cost

the manufacturer to make and deliver them and their contract price, if that price is greater than the cost."

§ 171. Buyer's Right to Possession of Goods.—If title has passed to the buyer and the seller refuses to give up the goods, the buyer may sue the seller for damages for withholding the goods or he may bring what is known as an "action in replevin" to force the seller to deliver the goods to him. A replevin action is based on the theory that the plaintiff is entitled to the possession of certain personal property. If he succeeds in proving this point, the court will order the defendant who is withholding the property to deliver it to the plaintiff.

Even though the buyer does not have title, but only a right under the contract to have the goods delivered to him, nevertheless if the article is of such a special nature that he cannot get it anywhere else, the buyer may go into a court of equity and sue to compel the seller to perform his contract. In other words, he would bring an action for specific performance. (See § 120.)

§ 172. Buyer's Right to Damages.—Where the right to enforce possession is not available, or if available not desired by the buyer, he may sue for damages.

The measure of damages is the difference between what he can buy the goods for in the open market and the contract price. If he can get them for the same price or less in the market, he does not, of course, suffer any damages.

§ 173. Buyer's Remedies for Breach of Warranty.—The buyer's remedies for the seller's breach of warranty are the following:

1. He may keep the goods and either:
   (a) Deduct an amount from the purchase price to cover the breach of warranty. (If the goods are worthless, he may deduct the entire price because the goods are worth nothing.); or

(b) Sue the seller for breach of the contract of warranty. He would adopt this remedy if he had paid the price before discovering the breach of warranty.

2. He may refuse to accept the goods, or if already accepted return them:

(a) If the goods have not been accepted and title has not passed, the buyer may refuse to take them and sue for damages for the breach of warranty.

(b) If title has passed or if the goods have been actually received, the buyer is limited to rescinding the contract. If he adopts this remedy he can secure damages for any actual loss caused by the defective character of the goods, but not for any lost profits. Also, he can recover the purchase price or any part of it that he has paid.

The measure of damages which the buyer may recover for breach of warranty is the difference between what the goods were actually worth as delivered and what they would have been worth if they had been as warranted.

When the buyer returns the goods, he must return them in as good condition as they were when received, unless the damage has resulted because of the fact that they were not as warranted. He cannot return them if he once accepted them knowing that they were not as warranted, or if he fails to notify the seller within a reasonable time that he refuses to take them. In any case, if the buyer intends to assert his rights, he should act at once; delay may be fatal. If he cannot make an examination on delivery, he should do so within a reasonable time thereafter. Just as soon as he discovers the defects, he should give notice of these defects to the seller. It is sometimes desirable to provide in the agreement of sale that the buyer may keep back part of the purchase price until he has tested the article warranted.

§ 174. **Examination of Goods.**—The buyer who has not previously examined the goods, is entitled to do so on delivery, and the seller is bound to allow him a reasonable opportunity to do so. Unless and until the buyer has had such a chance to inspect the goods to see whether they conform to the contract, he will not be deemed to have accepted them. However, the buyer will not have this right where he has agreed that the goods are to be shipped by a carrier C. O. D.

The right of inspection must be exercised within a reasonable time and usually at the place of delivery. Any expense incident to it will ordinarily be paid by the purchaser, but he is entitled to use a reasonable quantity of the goods without charge, if such a test is necessary.

§ 175. **Acceptance.**—The Sales Act provides that the buyer is to be deemed to have accepted the goods,

1. When he intimates to the seller that he has accepted them.
2. When, after delivery, he does any act that is inconsistent with the seller's ownership (e.g., pays part of the price, mixes the goods with his own, sells part or all of the goods, etc.).
3. When he retains the goods for more than a reasonable time without giving notice of rejection to the seller.

§ 176. **Acceptance Does Not Waive Damages.**—The Sales Act provides that the buyer, by accepting the goods, does not waive any claim for damages for breach of warranty. However, the buyer is required to give notice to the seller of any such breach within a reasonable time after the buyer knows or ought to know of such breach: otherwise the breach is excused.

The notice should state all objections, because any that are not stated are waived.

Review Questions

1. What are the chief rights of an unpaid seller?
2. Explain the seller's lien?
3. When does it arise?
4. When is it not available?
5. Explain stoppage in transit?
6. When is it not available?
7. What is the status of the common carrier when the right of stoppage in transit is invoked?
8. Explain the seller's right of rescission.
9. In what cases may the seller hold the buyer for the price of the goods?
10. What are the rules for determining damages?
11. What can the buyer do when the seller refuses to deliver the goods although the title has passed?
12. What can the buyer do when he has only the right to have the contract of sale carried out?
13. What could a buyer recover for the seller's failure to deliver goods under the contract?
14. If the goods fail to come up to the warranty, what courses are open to the buyer?
15. What may be the effect of the buyer's delay in giving notice of a breach of warranty?
16. Discuss the buyer's right to inspect the goods.

Agency

CHAPTER XXII

PRINCIPLES OF AGENCY

§ 177. Subject of Agency Is Important.—In the complex commercial life of today much of the world's business is of necessity transacted by proxy. The amount of business that one man can do is limited. Hence, to conduct the great activities of the world, those with executive ability empower others to act for them. At the present time the larger proportion of business men are not doing business for themselves, but are acting as agents for others. On this account the subject of agency is of primary importance. Many men are principals, yet more are agents; and all of us have to do with agents and should know their powers and should understand the interrelated rights and liabilities of agent, principal and third party. The law of agency enters into all branches of business and will recur again and again in the treatment of other subjects in this work. The subject of agency is of vital importance in insurance, partnership, and corporation law.

§ 178. Definitions.—An agent is one who represents, or is authorized to represent, another person in a business transaction or transactions with third parties.

The person represented is known as the "principal."

The person appointed may be known as "agent," "factor," "broker," "attorney," "proxy," "delegate," or "representative."

The person with whom the agent deals on behalf of the principal is called "the third party."

The relation between the principal and the agent is termed "agency."

§ 179. **The Principal.**—Anyone capable of transacting his own business may appoint an agent to act for him.

The legal doctrine of agency is based on the principle that whatever a person may do for himself, he may do by another person. The person who appoints an agent must be, therefore, capable of transacting his own business; that is, when he appoints an agent, he must be sane, sober, and capable of acting for himself.

In regard to the minor, the rule in most states is that the minor's contract with his agent and the contracts made by his agent are, like the ordinary contracts of the minor, voidable. So a minor may, in the great majority of states, be a principal, but may disaffirm the contracts he makes in this capacity. In a few states the minor cannot be a principal and any contracts that he attempts to make as principal are void.

Corporations may appoint agents to accomplish their corporate purposes. Partnerships may appoint agents and each partner is held to be an agent for the firm. Married women may appoint agents.

§ 180. **The Agent.**—Any person who is qualified to perform the act in question may do it as the agent of another.

The particular point to be noted in this statement is that a person may be legally incompetent to act for himself, but yet may lawfully act as agent for someone else. For example, a minor in making a contract for himself does not absolutely bind himself, but he may act as agent for an older person and what he does may absolutely bind the older person. The reason for this distinction is that the minor when he acts as agent for another is acting under instructions and is not relying entirely on his own judgment. Furthermore, in the event of any loss, the adult, that is, the principal, and not the minor will be the one who will suffer.

A child may be the agent of his parent; but he must be appointed an agent; he is not an agent simply because he is the

child of, or is living in the house with the parent. In such cases, to be an agent, the child must have been directly authorized by the parent to act along certain lines, or else it must be shown that the child had been in the habit of so acting with the approval of the parent.

§ 181. **General Agents.**—A general agent is one authorized to assume entire charge of his principal's business, or of all of some line of the business, or all of his principal's business at some particular place.

Unless notified to the contrary, people dealing with a general agent have the right to presume that he is authorized to do anything usually done in such a business. They may assume that he has wide powers in his particular line and ordinarily need not make any inquiry as to the extent of his authority; but in doubtful cases they should do so to be on the safe side.

The manager of a business is a general agent with power to use his individual judgment and to act largely upon his own initiative. His employer controls and limits his general policy, but he does many specific acts at his own discretion, and delegates authority in minor details to subagents who answer to him for what they do.

For instance, a manager of a grocery store is a general agent for that purpose and has authority to purchase all kinds of goods that are sold in the store, and to contract for necessary repairs and improvements in the store. He has no authority to buy dry-goods, hardware, or other things outside his line of business. He has no authority to sell the whole store, or to buy real estate, or to build a new store.

§ 182. **Special Agents.**—A special agent is one authorized to act in a specific transaction or in a limited line of business. The authority of a special agent is not so broad as the authority of a general agent.

Third parties who deal with such an agent should be care-

ful to ascertain his exact authority, because they have no right to indulge in any presumptions as to his authority.

A special agent is authorized to do some special thing. He may make, for instance, but the one contract or the one sale for which he has been appointed. Should he do some other special thing, which he honestly considers more to the interest of his principal, he would depart from his instructions and he alone would be liable; the party represented would not be bound. For example, an agent authorized to sell a particular painting would have authority to sell *that* painting and to bind his principal in what he did in connection with the one transaction, but he would have no authority to do anything else. But if the agent had been requested merely to find a purchaser, he would not have authority to sign a contract of sale.

The following is a form that may be used in appointing a special agent:

I, the undersigned, do hereby constitute and appoint Arthur C. McCall of Cincinnati, Ohio, my agent and representative, for me and in my place and stead to receive and receipt for any and all payments that may be payable to me from the estate of Howard Lansing, deceased, late of Hamilton County, State of Ohio, and authorize him to do all other things that may be necessary to carry into effect the intent of this appointment, and I hereby ratify and confirm all that my said agent may do in pursuance of the authority herein conferred.

In Witness Whereof, I have hereunto affixed my signature and seal, in Kingston, New York, this 8th day of January, 1926.

John H. Martin [L.S.]

Nixon *v.* Palmer, 8 N. Y. 398

D authorized his son to accept a draft for $2,000, drawn on D at not less than 30 days. The son accepted a draft for $482 payable 90 days after date in the name of his father. P sued on the draft.

Held: For D. The son was a special agent and third parties in dealing with him were strictly limited to the authority he actually possessed.

§ 183. **Del Credere Agents.**—A selling agent who guarantees payment of the accounts that he sells is termed a "del

credere agent." Usually the agent receives a higher compensation because of the guarantee. In England and in a few American jurisdictions, the del credere agent is regarded as a surety; but in most states he is looked upon as a principal and may be called upon to pay even though no effort has been made to collect from the purchaser.

§ 184. **Instruments Under Seal.**—An agent who is to execute a deed or instrument required by law to be sealed must be appointed by an instrument of like formality. The most important feature of a deed is the fact that it is executed under seal. It is usually witnessed and then acknowledged before a notary public. Consequently the power of attorney by which the agent is given authority to make the deed on behalf of the principal should have the same formal execution and the same acknowledgment as the deed. In fact, the power of attorney is a formal document; it should be under seal and should be executed and acknowledged as stated.

Although the deed, which is the instrument by which the title to the real property is transferred from the seller to the buyer, must have a seal, the contract for the sale of the property, which precedes the actual giving of the deed, need not have a seal. Under the Statute of Frauds, however, the contract must be in writing; but whether the agent's authority to make such a contract need be in writing depends upon the law of the particular state in which the contract is made.

There are some exceptions to this rule that an agent to execute an instrument under seal must be appointed under seal. They are the following:

1. Where the agent signs the instrument in the presence of the principal.
2. Where the instrument signed by the agent is not required to have a seal. As the seal in this case is not indispensable, the agent is not required to have authority under seal.

3. Where the agent in signing, signs as a partner for his firm.
4. Where the agent signs for a corporation.

§ 185. **Interpretation of Contract.**—The contract of agency is to be interpreted in the light of what both parties reasonably understood it to mean. The same rules that apply to contracts in general govern this type of contract. (See § 84.) Any well-recognized custom in the particular trade or business to which the contract of agency relates, such as the custom of paying a certain percentage as commission to insurance or real estate agents, etc., will be considered in seeking to find out the meaning of the contract.

§ 186. **Servants and Employees.**—An employee or servant may also be an agent, if authorized, to do business with third parties. An employee or servant is one who is employed to do certain mechanical work and who ordinarily has no right to enter into business relations with third parties on behalf of the employer. Chauffeurs, brakemen, and factory workers are servants or employees. An agent, on the other hand, represents the principal in dealings with third parties and makes contracts for the principal. In other words, the servant or employee is a mere mechanical worker, whereas the agent is a business representative.

It happens in many cases that an employee is also an agent, but his functions as an agent are distinct from his functions as an employee. For example, a domestic servant becomes an agent when he or she is authorized to buy supplies.

§ 187. **Independent Contractors.**—In a contract of agency, the principal directs how the agent is to do his work and what result he is to attempt to accomplish. This personal direction by the principal is an essential feature.

Independent contractors are not agents or employees. An independent contractor is a man who engages with another

to hand over to him in completed form some particular piece of work, and to receive a certain sum of money for doing it. Ordinarily the builder, who takes a contract to erect a building, is an independent contractor. His contract in most cases is to erect a building according to certain plans and specifications and to receive a certain sum for so doing. So long as he follows the plans and specifications, the owner has no right to interfere with the work or give him any directions. When this is the arrangement, the owner is relieved from liability for the acts of the workman and any claims for damages must be brought against the builder. On the other hand, when the owner reserves the right to interfere and give directions, whether or not he actually gives any directions, he remains responsible for any injury caused in the construction work because he is the party having the ultimate control.

There are certain cases in which the owner may not exempt himself from liability by engaging an independent contractor. The following are examples: where the work is extra-hazardous (as clearing away shrubbery by burning it); where the work is illegal; where the contract calls for the erection of an unsafe structure; where the contract involves any interference with the highways (as excavating or laying car tracks in the streets). In all of these cases the owner cannot throw off responsibility by delegating the work to an independent contractor.

Review Questions

1. What does the word "agent" mean?
2. Why is the subject of agency important?
3. Give some names applied to those who act for others.
4. What is needed to make a person competent to appoint an agent?
5. What is the effect of a minor's appointment of an agent?
6. Name four kinds of principals.
7. Why is it that a minor can be an agent?
8. How can it be known that a minor is authorized to act as the agent of his father?

9. What is a general agent?
10. What limit is there on the authority of a general agent?
11. How can you tell whether an agent is a general or a special agent?
12. What are the limits on a special agent's actions?
13. How does a del credere agent differ from other agents?
14. When does an agent require authority under seal?
15. What is the difference between a servant and an agent?
16. Who is an independent contractor?
17. What is the effect of employing an independent contractor instead of an agent?

CHAPTER XXIII

FORMATION OF AGENCY

§ 188. Methods of Formation of Agency.—An agency may be created in the following ways:

1. By appointment
2. By ratification
3. By estoppel
4. By necessity

§ 189. Appointment in Writing.—It is only in rather exceptional cases that the agent is required to have authority in writing. Even where the contract to be made by the agent comes within the Statute of Frauds, the agent in most cases need not have written authorization. This is true even where the agent is to sign a contract for the sale of an interest in land, although a few states require written authorization in this case; but if the agent is to sign the deed, mortgage or lease by which the interest is conveyed, then he must have written authority.

The reason for this is that such an instrument is required to be under seal and the rule is that an agent who executes a sealed instrument must have authority under seal.

Written authorization may be in the form of a power of attorney or in the form of a contract.

§ 190. Appointment by Power of Attorney.—The regular form of the power of attorney is a formal written authorization under seal. Where land is to be conveyed or a mortgage or lease executed, the power of attorney should be executed just as carefully as a deed and acknowledged before a notary public or commissioner of deeds so that it can be filed in the registrar or recorder's office along with the instrument executed.

The following is an illustration of a formal power of attorney.

KNOW ALL MEN BY THESE PRESENTS:

That Neckwear Stores, Inc., a corporation organized under the laws of the State of Maryland, have made, constituted and appointed, and by these presents do make, constitute and appoint Harvey T. Edwards true and lawful attorney for it and in its name, place and stead, to conduct the business of operating a branch store in the City of Minneapolis, Minn.; to open a bank account in its name; to endorse and deposit to its credit in the said bank account notes, drafts, trade acceptances, and other negotiable instruments; to draw and sign checks in its name against such deposits of such moneys; to engage and discharge employees; to sell goods, wares and merchandise handled in such business for cash or on credit; and generally to do all things necessary and proper in the ordinary conduct of the business of a branch store; hereby giving and granting unto its said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as it might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that its said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, it has hereunto set its hand and seal the fifth day of December, in the year one thousand nine hundred and twenty-five.

NECKWEAR STORES, INC.,
By JAMES R. HALL,
President

Sealed and delivered in the presence of
A. S. HARKNESS

STATE OF MARYLAND
CITY OF BALTIMORE } *ss.*
COUNTY OF BALTIMORE

On the fifth day of December, in the year Nineteen hundred and twenty-five, before me personally came James R. Hall, who, being by me duly sworn, did depose and say that he resides in the City of Baltimore, State of Maryland; that he is the President of Neckwear Stores, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

ESTHER MARTINS
Notary Public, Baltimore Co.
State of Maryland

Where an agent is to represent a stockholder at a corporate meeting, he is given a "proxy." This is a power of attorney for a special purpose. It should be witnessed, but most corporations do not require it to be acknowledged.

Where the agent represents the principal in foreign countries, it is customary to give him a power of attorney as evidence of authority to show to third parties and as authorization to sue, if necessary, in foreign courts. Such powers of attorney, in order to comply with the requirements of the countries where they are to be used, should be drawn by trained international attorneys.

Frequently an agent is given an informal power of attorney. This may be in letter or memorandum form. The following is an example:

615 West 121st Street,
New York City,
December 2, 1925.

Mr. Arthur C. McCall,
317 Newkirk Avenue,
Omaha, Nebr.

Dear Sir:

I hereby constitute and appoint you my agent and representative for me and in my place and stead to receive and receipt for any and all payments that may be payable to me from the Estate of Howard Lansing, Deceased, late of Hamilton County, State of Ohio; and I authorize you to do all things that may be necessary to carry into effect the intent of this appointment; and I hereby ratify and confirm all that you as my agent may do in pursuance of the authority hereby conferred.

Yours very truly,
(Signed) Howard Fitzpatrick

§ 191. **Appointment by Contract.**—The agent who has a power of attorney may or may not have a contract with the principal. For instance, the holder of a corporate proxy usually does not have any contract with the stockholder he represents.

We must disassociate the power of attorney from the contract. The former shows the agent's authority: the latter governs the mutual rights and obligations of the principal and the agent. Of course, the contract may combine with it the effect of a power of attorney by setting forth the acts that the agent may do. But exhibiting it to the third party as a

grant of authority would destroy the privacy between the agent and the principal.

The third party is not concerned with the contractual relation between the principal and the agent. It makes no difference to him whether or not there is such a contract. All the third party cares about is the agent's authority; the principal is just as responsible for the duly authorized acts of a gratuitous agent as for a contract agent.

Where there is a contract relation, it is desirable unless the agency is unimportant or clearly governed by custom, to have a written contract.

The following is an example of an agency contract:

AGREEMENT made Sept. 12, 1925, between the Riverview Realty Company, Inc., (hereinafter referred to as the Owner) and John T. Morgan (hereinafter referred to as the Agent).

The parties agree as follows:

1. The Owner hereby employs the Agent as general agent to take complete charge of the premises at 310 West 101st Street in the Borough of Manhattan, in the City of New York, and empowers the Agent to demand, collect and receive all rents; to engage any and all employees on terms and for salaries or wages to be determined by the said Agent, and to discharge any such employees; to buy any materials required on the said premises, and to order, direct and superintend the making of all repairs and decorations, and to pay for the same; and generally to perform all necessary acts and to make all necessary expenditures in connection with the said premises.

2. The Agent accepts the said employment and agrees to furnish sufficient facilities in the way of an office and clerical help to take care of the proper administration of the work, and to give a reasonable amount of his personal time and attention to representing the Owner as herein provided; and the Agent further agrees to give the Owner a monthly accounting of all receipts and disbursements and to pay the balance remaining to the Owner.

3. The Owner agrees to allow the Agent and the Agent agrees to receive three percent of the gross receipts for his services, and it is agreed that the Agent may deduct such percentage at the time of the rendering of the monthly accounting.

4. This Agreement is to begin on September 15th, 1925, and is to remain in force for one year, unless either party should elect to terminate the same by giving thirty days' notice in writing to the other party.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals this 12th day of September, 1925.

RIVERVIEW REALTY CO., INC. [L.S.]
By EDWARD PETERS, *Pres.*
Owner

JOHN T. MORGAN [L.S.]
Agent

§ 192. **Agency by Ratification—In General.**—Where one acts as the agent of another without authorization, his acts as agent may be ratified by the acquiescence of the principal or by the principal's taking the benefit of the agent's performance. It happens not infrequently that an agent, appointed for a definite set of duties, sees opportunity to do something for which he has no authority, but which will benefit his principal; or sometimes a person volunteers to act as agent for a principal whom he has not had opportunity to consult. After an unauthorized act of this kind has been done, the principal, when he learns of it, may:

1. Refuse to be bound by it.
2. Expressly ratify it.
3. Impliedly ratify it by accepting the benefit of the action.

§ 193. **Effect of Ratification.**—Ratification relates back and takes effect as of the date of the act ratified. Hence it has the effect of an original authorization and makes the situation the same as if the agent had been fully authorized from the beginning.

Ratification relieves the agent of responsibility, because the principal thereby accepts his act and the third party obtains what he sought—a contract with the principal.

To the principle that ratification is retroactive there are two exceptions:

1. The third party may withdraw before ratification. The third party to an authorized and unratified contract is really simply making an offer and if he recalls the offer, the principal can not thereafter bind him by ratification.

2. The acquired rights of outside parties cannot be nullified by ratification. For example, on July 1, B, without any authority to do so, purports to sell A's house to C for $10,000; on July 2, A, not knowing of B's act, contracts to sell his house to X for $9,000; A, on hearing of B's $10,000 price seeks to avoid his own $9,000 price by applying the rule that ratifica-

tion is retroactive, but he cannot ratify, because by doing so he would sweep aside X's right which has already become fixed.

§ 194. **Requisites of Ratification.**—The following are the requirements for ratification:

1. The contract must be made on behalf of an existing principal who must be named or clearly referred to. The theory is that the ultimate ratifier was held out all along as the principal. The name need not be given if the identity is indicated. For example, insurance may be taken out in favor of "all persons that have an insurable interest" in the property insured.

2. The principal must be competent to ratify and also because of the retroactive effect of ratification must have been competent when the contract was made.

3. The contract ratified must be legal, both when ratified and when made. As to a forged contract, the law, in some states, permits ratification as to the civil aspect of the contract, but, of course, never allows ratification of the criminal aspect.

4. The contract must be ratified as a whole. The ratifier cannot select the favorable points and refuse the others.

5. The ratification must be with full knowledge of all the material facts; consequently if the ratifier was in ignorance of any important point, he may later withdraw his ratification. This is but fair as the principal did not conduct or direct the transaction and instead of repudiating the obligation voluntarily assumed it.

Penn Match Co. *v.* Hapgood et al., 141 Mass. 145

P alleged that its promoters contracted with D for certain machinery, the promoters having explained that the organization of the P corporation was dependent upon the making of the machinery purchase contract, that the machinery had not been delivered and that P had thereby been damaged.

Held: For D. P, not being in existence, could not ratify; therefore P did not have a contract upon which to base its case.

§ 195. Agency by Estoppel.—The two types of agency, previously discussed in this chapter, i.e., agency by appointment and by ratification, are based on the consent of the principal. But agency by estoppel, as its name implies, is an involuntary agency that is imposed on the principal to work out justice.

To create an agency by estoppel, these elements are necessary:

1. The principal's conduct must have been such as to indicate that the agent has apparent authority.
2. The third party must have dealt with the agent relying on this apparent authority.

This type of agency may occur even though the alleged agent had not the slightest vestige of authority. For example, A stands by and sees B, to whom he had given no authority at all, sell goods belonging to A and makes no protest, but acquiesces. A will be held to have appointed B his agent and will be bound by B's acts.

Such a case is rare. In nearly all cases we have to deal with an agent who had at least some authority but who has overstepped the bounds without restraint from the principal. The principal often becomes bound, not by any positive thing which he has said or done, but because of his acquiescence in what the agent was doing, or his failure to protest at the proper time. In other cases the principal has allowed the agent to do certain things beyond the latter's authority; and this has continued until a course of dealing has become established. In all such cases, third persons are justified in assuming that the agent's apparent authority is real, and the principal will be bound. To hold otherwise would work an injustice to the third party.

For example, a salesman is instructed by his employer that he is not to give any warranties with the goods that he is sell-

ing. In disobedience of these instructions, he does in several cases give warranties to customers. The merchandise sold does not come up to these warranties, but the principal, not wishing to take advantage of the agent's lack of authority, makes good on the warranty. Other customers, hearing that the principal has stood by the warranty given by the agent, are entitled to presume that the salesman has authority to give such warranties.

An agent to sell goods who has possession and is in a position to deliver them is authorized to receive payment; but if he is not in possession of the goods, he is not authorized to receive payment.

When in the usual course of the business of a corporation an officer has been allowed, in his official capacity, to manage its affairs or to make certain contracts, his authority to represent the corporation will be inferred from the manner in which he has been permitted by the company to conduct its business.

A wife, as the domestic manager of the house, may buy all things that are naturally and ordinarily necessary for the management of a household. She may contract for household supplies, domestic service, medical attendance, articles of clothing for the use of herself and children, suitable to the style in which the husband lives. It is implied that she is authorized to do this, and the husband is held responsible for the cost. She is not held to be authorized beyond this, unless expressly made the agent of the husband for some particular purpose, in the same manner in which he would appoint a stranger.

Usage and trade customs count heavily in deciding what constitutes the apparent authority of an agent.

However, the third party must in good faith believe that the agent has the authority or appears to have. Otherwise there will be no estoppel.

§ 196. **Limitation of Agent's Authority.**—An agent rarely has unlimited authority. In established positions, such as that

of a bank cashier, a railroad conductor, or a retail salesman, the duties are settled and the authority of the incumbent is clearly understood by all concerned; but where the agency is out of the usual line, the agent's authority must be determined largely by his representations and by the principal's conduct.

As between his principal and himself, the agent's authority is limited: (1) by the limitations usual to the employment, and (2) by the limitations expressed in the agreement. If he exceeds these limitations, he may be discharged from his position, and may be held for damages, if he is responsible.

In dealing with third parties, the agent, in all those cases where his apparent authority exceeds his real authority, may bind his principal. In such an event, the agent must answer to his principal for his abuse of authority.

§ 197. Agency by Necessity or by Operation of Law.— Authority to act as agent is created by operation of law where such authority is a matter of necessity.

Aside from the ostensible or presumed authority of the wife discussed in the previous section, the wife as a matter of law has the right to buy necessities on the husband's credit if he fails or refuses to support her. The matrimonial obligation of the husband to support his wife cannot be thrown off as long as the marriage continues. The husband may publish an advertisement that he will not be liable for his wife's debts: nevertheless, he will remain liable for her purchases for necessaries unless he is providing adequate support. What are necessaries will depend upon the husband's station in life. If he is wealthy, jewelry and fine clothing may be considered as necessaries for the wife.

In some states the minor child, like the wife, may be an agent by necessity to pledge the credit of the father for necessities that the father will not provide. This agency is not allowed in all states and where allowed it is restricted to actual necessities regardless of the father's station in life.

Where a crisis or emergency occurs and the employee is unable to confer with the employer, the law confers special authority on the employee.

A ship captain, who cannot communicate with the owners because of cable trouble may order repairs at the owner's expense so that the vessel may proceed on her voyage. Or if the cargo starts to decay and immediate cable communication cannot be had with the principal, he may sell at once.

In many states, it is held that the conductor, in the case of a railroad accident, may engage doctors and nurses to care for injured passengers and employees.

§ 198. **Appointment of Subagents.**—Unless expressly or impliedly authorized, an agent is not empowered to appoint a subagent.

An agent is chosen because the principal places special trust and confidence in him. It would not be right for an agent to have power to delegate his authority to someone else, whom the principal might not care to have represent him. This is a maxim of the law—that delegated authority cannot be delegated. Of course, this principle would not apply if the agent had been authorized to pass on the authority to a subagent or if it were customary to do so in that line of business. Authority cannot be passed on to someone else unless the agent has been expressly authorized to do so, or unless it is customary in the particular line of business.

A distinction is to be noted between acts requiring discretion and acts simply involving some mechanical performance. An agent authorized to handle important matters may employ others to help him in the mechanical details. He may employ clerks, bookkeepers, and draftsmen, but the agent would remain responsible for any mistakes by them. If it were customary, he could employ an assistant superintendent and supervisors, but he could not delegate the active supervision to someone else.

§ 199. Void Contracts of Agency.—Contracts of agency for an unlawful purpose, as is the case with other contracts (see §58), are illegal and cannot be enforced.

For example, a contract to conduct a gambling establishment would be absolutely void. The principal could not hold the agent liable for failure to carry out the contract, and the agent could not collect any compensation for the unlawful service.

A contract to procure an agent to commit a positive crime, to bribe legislators, to forge a will, or to commit a burglary, is void absolutely and entirely.

Any contract opposed to public policy is void.

Certain things are said to be against public policy. Examples are the following: to contract with a lawyer to organize a trust in restraint of trade; to employ a broker to negotiate a marriage; to promise a purchasing agent a certain commission if he will buy your merchandise for his principal.

In any contract to do an unlawful act, both agent and principal are liable to damages and to criminal prosecution. If an agent or an employee were engaged to smuggle in silks, both the subordinate and the principal are liable to prosecution and whatever penalties are imposed. In legitimate business the agent acting within his authority makes his principal liable but does not make himself responsible. In any illegal business, the responsibility attaches to principal and agent alike.

Review Questions

1. In what four ways may an agency be created?
2. When does the agent require authority in writing?
3. What is a power of attorney?
4. What is a proxy?
5. What is the difference between a power of attorney and an agency contract?
6. Explain ratification and its effect.
7. Enumerate the requisites of ratification.
8. What is agency by estoppel?

9. What are its elements?
10. What implied authority does a wife have to bind her husband with regard to the purchase of household necessities?
11. Explain agency by necessity.
12. Give examples.
13. Why is an agent not allowed to appoint a subagent?
14. What kind of things may be delegated?
15. When are contracts of agency void?
16. What is the difference between the liability of an agent engaged in a lawful transaction and one doing an unlawful act?

CHAPTER XXIV

THE PRINCIPAL

1. Obligations to Agent

§ 200. **Principal's Duty to Pay Agent—In General.**—Except in the case of a gratuitous agent, it is the duty of the principal to compensate the agent for his services. It is desirable to have the amount or the rate of compensation fixed by contract. Even though there be no express contract, the parties will usually have an understanding as to the agent's salary or commission. In the absence of any agreement, the agent will be entitled to the reasonable value of the services rendered.

The usual rules which govern employment prevail in this relation. If the principal terminates the agency before the end of the period of employment, he must compensate the agent for the unexpired term, less any amount the agent can secure from some other employment. It is his duty to try to obtain other employment, and the damages which he may recover are limited to the difference between the wages he would have received and any sums which he has been able to earn since, or would have obtained had he really tried to get other employment.

§ 201. **Payment of Commission.**—If the agent is working on a commission basis, his compensation is contingent. No matter how hard, how long, or how intelligently he works, he will not be entitled to a cent if he fails.

However, the commission is earned when the agent secures a third party ready and able to accept the principal's terms, regardless of whether the principal actually closes with the third party. For example a salesman is entitled to full commission on all orders he produces, whether accepted or not, un-

less the principal has specified that commission shall be paid only on orders accepted and that he shall have the absolute right to reject any orders submitted. Sometimes it is stipulated that the commission shall be due only when the orders have been paid for by the customers.

If the commission agent does not have a contract with a definite duration, he may be discharged at any time and the principal will not have to pay any commission on the agent's prospective sales, even though one or more of them may later be consummated by his successor or by the principal himself. However, the discharge must be in good faith. Hence if the agent is actively negotiating for a certain deal with a reasonable chance of success, he is entitled to sufficient time to put it through. If this is denied and the deal subsequently is closed, the original agent may properly claim his commission.

Gelatt *v.* Ridge, 177 Mo. 553

P, a real estate agent, was employed by D to find a purchaser for his property on certain terms. P found a buyer, but D advanced the price and broke up the deal. P sues for commission.

Held: For P. The commission was earned by P, who did everything required of him.

§ 202. Principal's Duty to Reimburse and Indemnify Agent.—Whether the agent is a gratuitous or a contract agent, the principal should reimburse him for his proper expenses. On the other hand, the principal does not have to pay for any expenditures caused by the agent's disregard of instructions or inexcusable errors.

If the agent in the proper performance of his duties has to assume any personal liability, the principal should indemnify him, by bond or otherwise.

§ 203. Employer's Duty to Safeguard Employees.—The following discussion applies principally to employees who are mechanical workers, that is, to servants rather than to agents, but in some cases it will also apply to agents.

The employer owes it to his employees to provide a safe, healthful, and suitable place to work in, and proper tools to work with. To do this, he must arrange for proper inspection to see that things are kept in good condition and remain so. And it is his duty to hire competent fellow-employees. An employee is not required to expose himself to the danger of working with drunken, reckless, or even incompetent associates.

These duties of the employer cannot be shirked. He is always responsible for failure to perform them, no matter whom he appoints to attend to them. He must keep buildings, etc., in proper repair, examine machinery to see that there are no dangerous defects in it, and inspect everything that comes to him from any other person to see that it is in safe condition before giving it to his employees to work with.

The law is reasonable. The employer is not responsible for an injury arising from an unknown defect, if he has used reasonable and proper inspection. He cannot be required to be continually inspecting; therefore it is the duty of employees to inform the employer of any defects which they notice. The employer is required to make only the ordinary tests used by those engaged in the same occupation. He need make these tests only at reasonable intervals.

§ 204. Common Law Restrictions on Employer's Liability. —Under the common law, the employer's responsibility for injuries to his employees was reduced to a minimum. The doctrine of the assumption of risk held that if the defects of equipment were such that the employee could see them, he assumed all the risk by taking employment. As a man who needed work was not in a position to reject it because equipment was unsafe, the doctrine prevented a multitude of injured workmen from receiving damages.

The rule as to contributory negligence relieved the employer from any responsibility if the workman had himself

been in any way careless. Many a crippled worker was defeated in the courts by reason of this rule.

The rule as to fellow-servants was a particularly unjust regulation. If the carelessness or negligence of a fellow-workman caused the injury, the hurt man had no compensation. He did not hire the men with whom he worked, but the law held that if he chose to work with them, and they were careless or incompetent, the employer who had hired them was relieved of all responsibility.

§ 205. Employers' Liability and Workmen's Compensation Laws.—The injustice of these rules and the disadvantage of the injured workman when he tried to enforce his rights in the courts, have led to the passage of many laws designed to remedy the condition. There are two classes of these laws:

1. The employers' liability laws, which aim to define the employers' liability and to modify or remove the objectionable common law rules.
2. The workmen's compensation laws, which try to systematize the responsibility for injury and to provide something in the nature of insurance for the wounded and bereaved in the fields of industry.

These laws proceed on the theory that if a workman is injured from any cause, there is a loss that someone must stand. In such a case, it seems that the particular industry should care for those who were injured in it, and that the care for the injured should be made part of the expenses of the business, so that careless and conscienceless employers would not be allowed to shirk responsibility.

2. Obligations to Third Party

§ 206. Liability of Disclosed Principal to Third Party.—The principal is of course liable on all contracts made by an agent acting within the scope of his actual authority, or whose acts, though unauthorized, were subsequently ratified.

The principal is also liable if the agent, though lacking actual authority, had apparent authority on which the third party reasonably relied.

Where both actual and apparent authority are lacking, there can naturally be no liability on the principal.

§ 207. Liability of Undisclosed Principal to Third Party. —An agent may conceal the fact that he is acting for a principal and make the contract in his own name. The agent thereby renders himself personally liable, but if he acted within his authority, the third party, upon discovering the identity of the principal might and usually would elect to hold the principal instead of the agent. The principal very properly is held liable because the contract was in reality made for him and under his instructions.

The undisclosed principal cannot complain, as the rule works both ways. He may at any time come forward and claiming the contract, require the third party to perform it.

The third party upon discovery of the undisclosed principal may hold either the agent or the undisclosed principal responsible. He must elect to hold one or the other: he cannot hold both. To this rule there are the following important exceptions:

1. If the contract made by the agent is in the form of a negotiable instrument or a sealed contract, the undisclosed principal has no rights or liabilities. He cannot sue or be sued, as such instruments are considered as having been taken solely on the face of the names appearing thereon.

2. If the principal before his identity was disclosed, in good faith paid the money due on the contract to the agent, he cannot he held liable. This is perfectly fair to the third party because he gave credit to the agent and expected to get payment from him and had no knowledge that there was somebody behind the agent. The third party may collect from the agent if he can, but it would be unfair to let him collect from the

unnamed principal who in that case would have to pay a second time.

3. If the third party after learning that there is a certain principal, unequivocably chooses to hold the agent, he cannot alter his decision and proceed against the principal.

4. If the contract states clearly that it is made only by the parties signing and that no other parties are to be introduced into the contract, the undisclosed principal rule would not apply.

§ 208. Principal's Liability for Wrongs Done by Employee.—A principal is liable for all fraudulent, negligent, or wrongful acts of his employee in the scope of his employment. If this were not so, it would be possible for a man to perpetrate all manner of fraud and wrong, and to escape punishment by employing some agent of no repute to do the "dirty work." A principal is liable for carelessness, deceptions, false pretenses, or wrongful acts of any kind committed by the employee in carrying out the purposes of his principal.

The difficulty is to determine whether the employee acted within the scope of the employment. For example, if an automobile salesman takes out a machine belonging to his employer to show to a prospective customer, and carelessly runs over a pedestrian, the employer will be responsible. If the salesman takes the machine out after hours for his own pleasure and does the same thing, the employer will not be responsible, because the accident did not occur within the scope of the salesman's duties.

The employer is not liable for the torts of the employee in these situations:

1. When the employee was acting beyond the limits of the employment, as explained above.
2. When the alleged employee is an independent contractor. (See § 187.)
3. When the employee at the time of the tort was under the control and direction of another party.

Review Questions

1. If the principal terminates the agency before the end of the period of employment, what must he pay?
2. When does an agent working on a contingent basis earn his commission?
3. Discuss the discharge of such an agent.
4. What is the extent of the employer's duty to safeguard his employees?
5. What were the common-law restrictions on the employer's liability for injuries to employees?
6. How have these restrictions been eliminated by statute?
7. To what extent is the principal obligated to the third party?
8. Explain the undisclosed principal rule.
9. What are the exceptions to the rule?
10. To what extent is the principal liable for wrongs done by the agent?
11. What does the "scope of employment" mean?

CHAPTER XXV

THE AGENT

1. Obligations to Principal

§ 209. In General.—An agent should obey orders, act with good faith, and use such prudence, skill, and diligence in his duties as are requisite for their proper discharge. He must, if necessary, keep proper accounts and render statements to his principal. He cannot delegate any duty demanding discretion to others without special authority. If he does not do all this, if he fails in his duty in any material respect, he may be discharged, his compensation may be denied, and he may be responsible in damages.

Any profits made in the course of an agent's employment belong entirely to his principal. An agent may not use his agency for his own advantage.

In making a contract with an agent or confidential employee, it is safest to contract that he shall not at any time, either while he is employed or thereafter, reveal or use for the benefit of himself or of others any special information, secret processes, lists of customers, or other private matters that may be learned in the course of his duty. The courts will protect such an agreement.

Where a salesman or solicitor is employed to work up trade, he necessarily becomes familiar with the list of customers. In such a case, a contract with an agent that he shall not, for a period of years, engage with any other house in the same line doing business in the same territory, will be sustained by the courts.

What is said as to the duty of the agent here refers to a general agency, where the agent gives his entire services to

one principal. In cases of special agency, what is said of the agent's duty applies only so far as is necessary to effect the object of the agency. A bank may be an agent to collect a draft, but is not called upon to exercise general obedience, loyalty, etc.

§ 210. Agent's Obedience.—Disobedience is good cause for discharge or refusal to compensate an agent, and renders him liable for any resulting damage. It is an agent's duty to obey orders; and by so doing he relieves himself of any responsibility in case of failure. The agent may think his own methods far preferable to the principal's; but if he uses his own he does so at the risk of incurring the principal's displeasure and of losing his job.

If, however, circumstances should arise which make it absolutely necessary to act contrary to the instructions he has received, it is his duty to do this, provided, of course, that it is impossible to consult his principal before acting. Emergencies may occur where it is the duty of the agent to do the best thing possible, even though it involves his disregarding orders.

§ 211. Agent's Good Faith.—The highest good faith is essential on the part of anyone acting in the capacity of agent. If an agent is found to be working for his own interests as opposed to those of his employer, he may be discharged summarily. If he makes false reports or deceives his employer, or defrauds him in any way, he may be discharged, and he will have forfeited any claim to compensation. If he learns of anything in the line of his business to the principal's advantage, it is his duty to let his principal know and have the benefit of it.

The Agent Must Not Act for Both Parties.—An agent may not represent both parties to a transaction. He may not earn a commission from both buyer and seller. This is a rule that holds good everywhere. A double agency may be valid, however, where both parties know of the double agency

and agree to it; it is then understood that the agent is simply bringing the parties together and is not advising either party.

The Agent Must Not Act for Himself.—If the agent is employed by a principal to manage his business, what he does is done for the principal. It is not right for the agent to be interested adversely; and all the profits that are made in connection with the principal's business belong to the principal, unless he has previously agreed to give the agent a share of the profits as part or all of his compensation.

If the agent in the course of acting for his principal obtains any particular advantage to himself, and the principal discovers it, the latter can hold the agent accountable for the profits or the property so obtained.

An Agent Must Not Compete with His Principal.—An agent must not be interested adversely to his principal. Neither may he represent and sell goods for a competitor of his principal. An employer has a right to his agent's absolute loyalty. If an agent uses his knowledge of his principal's affairs to secure an advantage for himself, the courts will compel him to make restitution. The law moves on a high plane in matters of this kind.

§ 212. **The Agent Must Be of Good Habits.**—Any habits which interfere with the proper discharge of the agent's duty are sufficient reason for his discharge. Drunkenness while attending to business is undoubtedly sufficient reason for dismissal. But in the case of other employees, the circumstances must be considered.

Generally speaking, an agent may be discharged for drunkenness, gambling, or licentiousness. Possibly, the courts would not in all cases justify too close an inquisition into the private habits of employees. Many banks, however, employ detectives; and if an employee indulges in loose living he is discharged and has no recourse. Usually an agent who is discharged for any reason of this kind cannot afford to risk the

notoriety involved in an attempt to hold his employer for damages.

§ 213. Agent's Care, Skill, and Diligence.—If anyone undertakes the duties of an agent, he is assumed to have the necessary skill and ability to perform the required duties. In all matters connected with his agency, he is expected to act as an ordinarily prudent, careful business man would act in the conduct of his own affairs.

As stated by the New York Court of Appeals in Whitney *v.* Martine, 88 N. Y. 535: "The rule is well settled that an agent is not only bound to act in good faith, but to exercise reasonable diligence, and such care and skill as is ordinarily possessed by persons of common capacity engaged in the same business."

In Sheppard *v.* Davis, 42 App. Div. N. Y.) 462, it was held that a firm of insurance brokers taking out policies for clients in irresponsible companies are responsible for the damage resulting from the neglect to use proper care.

Custody of Funds.—It is the duty of the agent to account for all funds and property of the principal which come into his possession. In this particular he must obey the rules that govern one person who holds the property of another.

The agent should not deposit funds belonging to his principal in his own bank account; but should open a separate account in the name of his principal, or in his own name *as agent.* If he does this, he is not responsible in the event of the bank's failure and the loss of part or all of the funds. In the same way, it is his duty to turn all money and other property in his possession over to the principal or to the principal's order.

2. Obligations to Third Party

§ 214. Agent's Liability for Torts to Third Party.—Every agent or servant is liable to third parties for every tort re-

sulting from his act or omission. The fact that the principal or master may also be responsible does not relieve the agent, because the individual whose acts or omissions caused the wrong should not be allowed to shift responsibility.

The most common tort committed by the agent against the third party is fraud. The fact that the agent in making certain fraudulent representations was following the instructions of the principal will not relieve him from liability if he knew the representations were false.

§ 215. Agent's Liability for Contracts to Third Party.—An agent is liable in contract to a third party in three cases:

1. When he makes a contract without naming his principal. The third party may, in most cases, elect to hold the undisclosed principal, but if he does not so elect, the agent will remain liable.

2. When the agent guarantees performance of the contract.

3. When the agent purports to represent a principal that is in fact non-existent. The agent by operation of law will be substituted for the fictitious principal. Thus promoters of a prospective corporation may be held personally on contracts that they made in the name of the proposed corporation.

Likewise if an agent represents an unincorporated association (see § 231), he will render himself liable.

§ 216. Breach of Warranty of Authority.—The agent is liable where he exceeds his authority and thereby causes damage to the third party, unless the principal ratifies his act.

In most cases where an agent deals with third parties, the third parties depend upon the agent to inform them correctly as to the extent of his authority. If the agent deceives them as to this, he makes himself personally liable to the third party for the resulting damages, because he has misrepresented this authority. Although liable for damages on the theory of a

breach of the agent's so-called "warranty of authority," he is not liable on the contract itself.

In any case where the third party is able to hold the principal because the agent's act although beyond his actual authority came within his apparent authority, the third party has no claim against the agent. Here the third party gets exactly what he wanted and expected—a contract with the principal.

Review Questions

1. For whose interest must an agent act?
2. To whom do any profits made by the agent belong?
3. Can an agent after finding out processes or other information pertaining to the principal's business, use such knowledge for the benefit of business competition? Why is it safest to contract specially as to these matters?
4. How far does what is said as to the duties of the general agent apply to the duties of the special agent?
5. If any agent disobeys instructions, what can the principal do?
6. In case of an emergency what can the agent do?
7. How much discretion has the agent in the ordinary course of business?
8. Can an agent act for both parties? Give reasons.
9. What is the effect if an agent is himself interested adversely to the principal?
10. What is the effect of any bad faith by the agent?
11. Can an agent represent two parties competing in business?
12. Would a bad moral character be a good reason for discharging an agent?
13. Would the fact of non-payment of salary or commission excuse bad faith on the part of an agent?
14. If the agent undertakes duties for which he is not competent, what is the consequence?
15. Where one person has charge of funds belonging to another, what should he do?
16. If the agent does not take these precautions and the money is lost, who is responsible?
17. Discuss the agent's liability to third parties for (1) torts and (2) contracts.
18. What is breach of warranty of authority?

CHAPTER XXVI

THE THIRD PARTY

§ 217. Third Party's Relation to Agent.—Strictly speaking, the third party has no relation to the agent. The agent represents the principal, and the third party is dealing only with the principal.

A third party dealing with an agent in excess of his authority does so at his own risk. It is obvious that an agent cannot go beyond his authority. He is authorized for such general or special purposes as the principal indicates, and further than this he may not go. When the agent goes beyond his powers, then he makes himself responsible and may be held for the ensuing damages; when he represents an undisclosed principal, or a fictitious principal, he may be substituted on the contract. The third party should know whether the agent with whom he is dealing has authority to represent his principal, and how far this authority justifies the action of the agent.

§ 218. Third Party's Liability to Agent.—As the agent's liability to the third party has been discussed in the last preceding section and also in §§ 214-216, we can now look on the other side of the picture. In the following cases the third party could be held by the agent:

1. When the agent made the contract in his own name, the contract is his and he may sue on it. Even though he states in a general way that he is acting as agent, the contract is still regarded as his, so long as he does not name the principal. Of course, if the agent were acting for an undisclosed principal and the latter claimed the contract and sued upon it, then the agent's interest would be absorbed in the principal's.

2. If the third party does any damage to the principal's

property while it is in the possession or under the control of the agent, the agent may sue on behalf of the principal.

3. The agent may hold the third party for damages for any personal tort committed against himself.

Namquit Worsted Co. *v.* Whitman et al, 221 Fed. 49

Plaintiffs (now defendants in error) executed the contract on which they sued in their own names, although the real principal was the Arlington Mills.

Held: Plaintiffs were entitled to sue in their own names, both because they executed the contract in their own names, and because they were agents of an undisclosed principal.

Moran *v.* Dunphy, 177 Mass. 485; 59 N. E. 125; 52 L. R. A. 115

P sued D for making statements to P's employer of such a character that P was discharged.

Held: For P. D maliciously and without justifiable cause induced P's employer to discharge him. This, regardless of "whether the inducement be false slanders or successful persuasion" is an actionable wrong. This is true even though the employment be at will.

§ 219. Third Party's Relation to the Principal.—The third party is really dealing with the principal, and the agent is merely the means of communication. When the contract is signed, the name of the agent is attached as agent, and the principal, not the agent, is bound. Therefore the relation between the third party and the principal is the same as between any other parties to a contract.

The third party is brought into the contract relation as a principal, and after that in most cases the agent is disregarded. The principal and the third party are the contracting parties and, if the contract has not been executed, each has the right to compel the performance or to recover damages for any breach or failure in performance. In any dispute in regard to the contract, the resulting suit will be between the parties, and the agent will not figure save as a witness able to give material evidence. If there has been fraud or false representation on

either side, the fact that the transaction has been negotiated through an agent does not affect the liabilities or the remedies.

§ 220. **Third Party's Liability to Principal.**—The liability of the principal to the third party was discussed in §§ 206-208. Looking at the matter from the point of view of the principal, we find that he can hold the third party in these cases:

1. Where the agent made the contract in name of the principal.

2. Where the principal's name was not disclosed, the principal, nevertheless, may enforce the contract by virtue of the undisclosed principal rule, unless the case comes under one of the exceptions to the rule.

3. Where the third party has been guilty of a tort in connection with the principal's property or business. If the third party obtained from the agent money or property of the principal by threats or false representations to the agent or by entering into a conspiracy with him, the third party may be held accountable by the principal.

Review Questions

1. What is the relation between the third party and the agent?
2. When may the agent hold the third party?
3. Discuss the relation between the principal and the third party.
4. In what cases will the third party be liable to the principal?

CHAPTER XXVII

TERMINATION OF AGENCY

§ 221. **Methods of Termination.**—The agency relation may be terminated by any one of the following methods:

1. By agreement or fulfillment.
2. By act of either party.
3. By disability.
4. By impossibility or illegality.

§ 222. **Termination by Agreement or Fulfillment.**—The principal and the agent may dissolve the agency by mutual consent. They may do so orally even though there is a contract of agency under seal.

If the agency is for a fixed time, as for one year, it terminates automatically at the expiration of the time specified. However, if the agent still continues to serve after the end of the period fixed and the principal acquiesces, there will be an implied renewal for an additional period of the same length.

When an agent is engaged for a special purpose, as the selling of a farm, the accomplishment of the purpose ends the agency.

§ 223. **Termination by Either Party.**—Where there is no fixed duration of the agency, it is an agency at will and either principal or agent is entitled to terminate it whenever he pleases and usually without notice. However, a principal has no right to dismiss an agent working on commission when the agent is in the midst of active negotiations and has a reasonable chance of effecting the sale and earning his commission, because his doing so would be bad faith.

The agency will be regarded as at will unless it has a definitely fixed duration. Engaging an agent at a stipulated

yearly or monthly salary is construed in most states as merely fixing the rate and not as specifying the period of employment.

Where there is a contract of agency for a fixed period, the agency may be terminated by either party for good cause.

But even where there is a contract of definite duration, the agency can be renounced by the agent or revoked by the principal, although doing so is a breach of contract. The only exception is that the principal may not revoke an irrevocable agency.

The power to terminate the agency, explained in the last paragraph, must not be confused with the right to do so. A principal who loses confidence in or takes a dislike to his agent cannot be forced to retain the agent during the period contracted for. He may dismiss the agent. But he will be liable in damages to the agent.

Likewise the courts will not force an agent to carry out the contract of employment against his will, but he will be liable in damages for failing to do so and if his services are unique, he may be enjoined from working for any one else in the same line until the expiration of his broken contract.

Irrevocable Agencies.—An agency will not necessarily be irrevocable because the principal specifies that it is to be irrevocable. The general rule is that a man cannot deprive himself of the power to administer his own affairs, but an agency will be irrevocable, whether so designated or not, if the agency is coupled with an interest or coupled with a liability.

The interest that is necessary in order to create an agency coupled with an interest is an interest in the subject matter of the agency, and not in the commission or earnings that may be derived from the exercise of the agency. An agent, who is to sell merchandise and receive a commission, is interested solely in securing compensation for services, and has no interest or control in the subject matter itself. On the other hand, a factor who makes advances against merchandise which is in his hands

for sale has an agency coupled with an interest; his claim against the merchandise for the advances made gives him an irrevocable agency. The same situation arises in the case of a lender, who has been given stocks, bonds or other securities as collateral. Likewise the making of a promissory note in which the holder is authorized to enter a confession of judgment if the note is not paid creates an agency coupled with an interest.

An agency coupled with a liability will also be irrevocable. If a principal creates an agency that entails liability to the agent, it would be unfair to revoke the agency without the agent's consent. For example, if a group of insurance underwriters appoint one of their number as their agent to adjust any claims against the insurance that they have underwritten, the authority of such agent would be irrevocable because he is liable along with his principals for the risks assumed.

§ 224. **Termination by Disability.**—An agent's authority is revoked by the death, insanity or bankruptcy of his principal; in like manner the relation is destroyed by the death or other disability of the agent. When a man dies, all contracts of agency cease at once; all powers of attorney, and every authority to anyone else to act for him are terminated. If in ignorance of his principal's death an agent did business for him, the business would be void and of no effect. This sometimes works a hardship on third parties, who have dealt with the agent in good faith and without knowing of the principal's death. However, an exception is made to protect a bank that pays out a check not knowing of the depositor's death.

The death of the agent also terminates the relation.

When the relation of principal and agent is broken up by the sickness or the other disability of the agent, the condition will be the same as when any other employee finds his term of employment broken by disability. In all such cases the general rule is that the agent or the employee is entitled to recover for

the time he acted, whatever the services were worth to the principal or the employer.

Insanity of the principal has the same effect as death. If insane, a principal can no longer contract himself, and neither can he contract by an agent. The insanity of the agent terminates the relation because he has no longer the capacity to represent his principal.

The relationship is destroyed by the bankruptcy of the principal; and also by the bankruptcy of the agent if the solvency of the agent is a matter of any moment to the principal.

Farmer's Loan and Trust Co. v. Wilson, 139 N. Y. 284

D paid rent to the regular collector of the landlord. The payment was made after the landlord's death, but this was unknown to D. The collector stole the money. P, as the landlord's executor, sued D for the rent.

Held: For P. Upon the principal's death the agency ceases, and a third party who pays the agent does so at his peril, even though he does not know of the principal's death.

Glennan v. Rochester Trust and Safe Deposit Co., 209 N. Y. 12

P's testator drew a check on his account with D bank, which paid the check in due course of business after P's death but without knowledge of his death. P sued for the return of the amount so paid out.

Held: For D. This is an exception to the usual rule that the death of the principal revokes the agency, because it would be entirely impracticable for banks before paying checks to ascertain whether the drawers were still living.

§ 225. Termination by Impossibility or Illegality.—If the subject matter of an agency is destroyed, the agency is thereby terminated. For example, if a building to be leased by an agent is burned down before a lease is effected, this terminates the agency. On the other hand, the destruction of the principal's office or equipment would not have this effect because they could be quickly replaced and the business continued.

An agency, perfectly valid at its inception, will become illegal by the passage of a statute forbidding the carrying out of such an agency.

§ 226. **Notice of Termination of Agency.**—When a principal terminates the authority of an agent, he should notify the agent. This is only fair to the agent, and unless it is done, the principal may have to pay the agent for services and assume liability in connection with subsequent contracts made by the agent.

A principal must always give notice of termination to a general agent, unless the contract provides for automatic termination, or for termination without notice, and the latter provision is one to which an intelligent agent would not assent. Even in the case of a special agent, the principal will usually be required to give notice of the severance of the relationship; but there are cases of special agency where a principal might normally be expected to have other agents, as for example, in the sale of real estate, and in such agencies the principal is under no obligation to notify the agent that the matter has been consummated through another agent. But even in these cases, in order to avoid any possible controversy, it is advisable to give prompt notice to any other agents concerned.

As to the third parties, the principal is bound to give notice of the termination of authority in cases of general agents, but ordinarily not in cases of special agents. However, if the principal knows that a special agent is engaged in active negotiations with a third party, the latter would be entitled to presume that the authority of such agent would continue to the completion of the negotiations; consequently, in such case notice is required.

As to the form of notice to third parties, the requirement is that the principal must give actual notice to all persons who have dealt through such agent and given credit to the principal. To all other third parties constructive notice, such as a newspaper publication, is sufficient.

Ahern v. Baker, 34 Minn. 98; 24 N. W. 341

D authorized W to sell a parcel of real estate. He also gave the same authority to F. W sold the land. F was not notified of

this, and shortly afterwards made a contract to sell the property to P. Upon D's refusal to perform this contract, P sued for damages.

Held: For D. This was a special agency. D was entitled "to employ several agents, and the act of one in making a sale would preclude the others without any notice, unless the nature of his contract with them required it. In dealing with the agent the plaintiff took the risk of the revocation of his agency."

Review Questions

1. In what four ways may a contract of agency terminate?
2. When will an agency be impliedly renewed?
3. When may an agent be dismissed without notice?
4. Under what circumstances would he have a claim for damages?
5. Explain the difference between the power and the right to terminate an agency?
6. What effect will the disability of either party have on the contract?
7. What effect has the death of the principal or the agent on the agency?
8. How may this affect third parties?
9. When is an agency irrevocable?
10. In what cases may the principal dispense with the giving of notice of termination of the relationship to the agent?
11. Is the principal required to give third parties notice of the termination of the authority of general agents? What is the reason for the rule?
12. Is the principal required to give third parties notice of the termination of authority of special agents? What is the reason for the rule? Are there any exceptions?
13. What are the requirements as to the form in which third parties should be notified of the termination of the authority of an agent?

Partnerships

CHAPTER XXVIII

THE ESSENTIALS OF PARTNERSHIP

§ 227. **Definition.**—Partnership is the result of an agreement, express or implied, between two or more competent parties to combine their money, property, skill or labor for the carrying on together of some lawful business for profit.

§ 228. **Distinctive Features.**—The partnership relation is characterized by certain distinctive features:

1. Each partner is an agent for the other partners in the transaction of any business within the scope of the agency. Of course his agency may be limited by the partnership agreement, but such limitations will bind third parties only to the extent that the limitations are known to third parties.

2. Each partner shares, either equally or in an agreed proportion, in the net profits of the business and usually in the losses also.

3. In case of insolvency each partner is personally liable for all of the firm's obligations.

4. The property, the business, firm name, good-will, and any trade-marks or other intangible possessions are firm property and form part of the common fund.

5. A partner is entitled to good faith and fair dealing from his associates, and on dissolution of the partnership may have an accounting to ascertain his interest in the business.

6. The partnership relation is a purely personal one and the partnership is terminated if any one of the partners dies, retires, or sells his interest in the firm.

7. The partnership does not have a distinct separate entity

like a corporation. The partnership may not sue or be sued in the firm name. It cannot contract with nor bring suit against its members, nor can they bring suit against it. However, the firm is recognized as an entity in contracts with outsiders and with some modifications, in the holding of property.

§ 229. **Theories of Partnership.**—The business man looks upon a partnership as a distinct organization, while the legal view, modified somewhat by the Uniform Partnership Act, has been to consider the individuals composing the firm, rather than the firm itself.

Also we must distinguish between the actual or true partnership and the partnership by estoppel. Here the point of view is all important. Does the problem involve the relation between the alleged partners themselves? If so, there must be a real partnership and this requires an agreement. But if the question arises between alleged partners and outsiders, then, although there be no real partnership, nevertheless, one may arise by estoppel in order to protect the outsiders.

Determining whether or not a partnership exists, where there is no specific agreement between the parties, is often a difficult legal problem. There are two distinct theories applied in different jurisdictions: the profit sharing theory; and the community of interest theory.

§ 230. **Uniform Partnership Act.**—The Commission on Uniform Laws approved the Uniform Partnership Act in 1914 and it has since been adopted in the following states:

Idaho	New Jersey	Utah
Illinois	New York	Virginia
Maryland	Pennsylvania	Wisconsin
Massachusetts	South Dakota	Wyoming
Michigan	Tennessee	Alaska
Minnesota		

The Uniform Act, although it necessarily accepts the legalistic theory that partnership is essentially an aggregation

of individuals, where possible recognizes the business view of the distinct entity.

§ 231. **Profit Sharing Theory—Essentials.**—The Uniform Partnership Act defines a partnership as follows: "A partnership is an association of two or more persons to carry on as co-owners a business for profit."

Analyzing this, we find these three elements:

1. An association of two or more persons. As the idea of an association requires an agreement there must be an express or implied contract.

2. To carry on a business. It must be a continuous undertaking and not a single transaction. Co-ownership in either land or personal property does not involve any partnership between the owners.

3. The persons associated must be co-owners of the profits. In other words, they must have an interest in the profits as profits and not merely by way of payment for loans, services, etc.

Associations not formed for profit are not partnerships. Incorporated clubs, churches, societies, associations, and fraternal organizations are not partnerships and do not involve mutual agency nor partnership liability. Co-operative societies which buy goods and distribute them among their members are not partnerships unless formed for the purpose of making a profit.

In general, the members of an unincorporated association are liable only for such acts of the association as they authorized or ratified.

Ash et al. *v.* Guie, 97 Pa. 493

The members of a masonic lodge, an unincorporated association, appointed a committee to erect a lodge building and authorized it to borrow money for this purpose. The committee accordingly borrowed money and gave the lenders certificates of indebtedness in the name of the lodge, signed by the officers and sealed with the lodge seal. A holder of one of the certificates brought suit joining all the members

as defendants and alleging that they were partners.

Held: For defendants. The members were not partners. Only the committeemen and those lodge members who participated in the erection of the building by voting for or advising it and those members who in any way assented to the undertaking or subsequently ratified it were liable for the amount of the certificate.

§ 232. **Sharing Profits Not as Partners.**—It is not safe to accept blindly the sharing of profits as a conclusive test of a partnership, because there are numerous cases where profits are shared not as profits but as compensation for non-partnership transactions. Consequently the Uniform Partnership Act provides that no inference of partnership shall be drawn if profits are received in payment of:

1. A debt, by installments or otherwise.
2. Wages.
3. Rent.
4. An annuity to a widow or representative of a deceased partner.
5. Interest on a loan, even though the amount paid varies with the profits.
6. Consideration for the sale of the goodwill of a business or other property.

In a separate paragraph, the Uniform Partnership Act takes up the situation where parties share profits received because they own property as joint tenants, tenants in common, co-owners, etc. The ownership of the property may of course be an incident of a partnership; but the mere ownership of the property and the receipt of profits therefrom will not of itself establish a partnership, because the profits come from property ownership and not from the operation of a business.

§ 233. **Sharing Gross Profits.**—The Uniform Partnership Act provides that sharing gross returns does not establish a

partnership, whether or not the persons sharing them have a joint or common interest in the property from which the returns are derived.

§ 234. **Community of Interest Theory.**—In the states that do not have the Uniform Act with its reasonably definite tests for determining whether a given association is a partnership, the whole matter is somewhat confused. In general, these states apply the rather vague "community of interest" theory. According to this theory, parties who receive part of the profits and also participate in the general management of the business are partners. Here the sharing in the profits is not as significant as the sharing in the control.

This is sometimes spoken of as the mutual agency theory. The term, however, mistakes the effect for the cause, as the mutual agency of the partners is the result of their having the right to direct the general policy and management of the business and to do those acts which require the assent of a principal.

§ 235. **Massachusetts Trusts.**—The investors in a business, instead of incorporating, may sign a declaration of trust in which they place their entire interest in the business in trustees who operate the enterprise for the investors. Such a business trust is called a Massachusetts trust, as this form of organization was first adopted in Massachusetts and has there been widely used.

A business trust of this sort, although not so intended by the investors, may be a partnership. The test is whether the declaration gives the investors the right to control the acts of the trustees. If it does, the trustees are mere agents of their principals, the investors, who are partners.

Williams et al. *v.* Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355

Ps were trustees of the Boston Personal Property Trust, which was a Massachusetts trust. The property was assessed for taxation as partnership property. Ps sought abatement from the assessment

on the ground that the property was trust property. The trust agreement gave full power to the trustees except that any alteration or amendment of the trust agreement had to be consented to by the beneficiaries who, however, could not force such alteration or amendment upon the trustees.

Held: For Ps. The property is trust property, not partnership property. The beneficiaries are not partners, because they have given the trustees unlimited control.

§ 236. Joint-Stock Association.—A joint-stock association is a form of business organization formerly popular but now practically obsolete. It is not organized under any statute, and, though usually adopting a corporate name and having some of the features of a corporation, is merely a copartnership, and the shareholders are responsible for the debts of the company as in partnership.

An important difference between such an organization and an ordinary partnership is that its members may transfer their interests exactly as stockholders do in a corporation. If there are many members, affairs are usually managed by a board of trustees or managers, and the individual members have no authority to act in the company affairs.

§ 237. Partnership by Estoppel.—In many cases where there is no true partnership, nevertheless, the alleged partner may be held liable to creditors, because he acted as though he were a partner and the creditors relied on the apparent partnership relation.

There must have been a holding out that the alleged partner was a real partner. The representation may have been made directly to the creditor or it may have been made indirectly by an advertisement, by a printed announcement, or by the use of the party's name on the firm stationery.

The representation must have been relied upon by the creditors; but this will be conclusively presumed where the holding out was in a public manner.

Review Questions

1. Define "partnership."
2. What are the essential elements of a partnership?
3. What are the usual rights of each partner?
4. What are a partner's powers as agent for the other partners?
5. What risk do you run when you enter a partnership?
6. What is the difference between the business and the legal views of partnership?
7. Where has the Uniform Partnership Act been adopted?
8. Explain the profit-sharing theory of partnership.
9. In what instances may profits be shared other than as partners?
10. Explain the community of interest theory of partnership.
11. What is a Massachusetts trust?
12. What are the differences between a joint-stock association and a partnership?
13. What is a partnership by estoppel?
14. A and B own a piece of land which they inherited. They share the rent paid by their tenants. A, without the knowledge of B, has a carpenter make some repairs to the building. Can the carpenter collect from B?
15. The president of a non-incorporated club buys some furniture for the club. Will the members be liable for the cost of the furniture? Why? Will any of the members be liable?
16. A was a horse-trainer and B the owner of a race horse. They made an agreement whereby A was to keep, train, and control the horse and both A and B were to divide the expenses and the winnings. Was this a partnership arrangement?
17. A makes a loan to the firm of X, Y & Co., who agree to pay him a certain percentage of the profits. Does this arrangement constitute A a partner of the firm?
18. A and B make an agreement whereby A agrees to run B's factory and B agrees to pay A a certain percentage of the profits. Is this a partnership arrangement?
19. B and L make an agreement whereby B furnishes a farm, team, and some labor and L furnishes the greater part of the labor and agrees to manage the farm. The profits are to be divided as follows: Two thirds to B and one-third to L. Is this a partnership agreement?

CHAPTER XXIX

THE CONTRACT OF PARTNERSHIP

§ 238. **Form of Contract.**—The customary and the only proper method of forming a partnership is by written articles of partnership signed by all the parties. These articles may be a very simple memorandum of agreement, or they may be expanded into elaborate articles of association, providing for the numerous details and possible exigencies of an extended commercial enterprise.

In spite of the dangers of such a course, partnerships are frequently formed by oral agreement. Under the Statute of Frauds, an oral contract of partnership to last more than a year is not valid. If, however, immediately upon making such a contract, the parties thereto enter upon its performance, a partnership at will is thereby formed, which is legal and is governed as to its terms by the contract, but which may be terminated at any time by either party, regardless of the terms of the contract.

It must be borne in mind that the Statute of Frauds does not apply to oral contracts made for any period *under* a year. Such contracts are binding for the specified length of time, and cannot be dissolved at will without incurring a liability for damages.

These Articles of Copartnership entered into on this 20th day of October, 1925, by and between Edgar H. Bedell, of the City of New York, and John A. Sutton, of the City of Hartford, Connecticut, WITNESSETH:

1. The firm name of said copartnership shall be

"E. H. BEDELL & CO."

2. The offices and place of business of said firm shall be situated in the City, County, and State of New York.

3. The purpose of said firm shall be to conduct the business of buying and selling chocolate, cocoa, and their products and preparations.

4. The capital of said firm shall be the sum of Twelve Thousand Dollars ($12,000), of which the said Edgar H. Bedell shall invest the sum of Four Thousand Dollars ($4,000) and the said John A. Sutton shall invest the sum of Eight Thousand Dollars ($8,000).

5. The said Bedell shall give his entire time and attention to the said business and shall engage in no other business, undertaking, or speculation during the continuance of this agreement.

The said Sutton shall give such part of his time and attention to said business as may be necessary, but shall not be required to give up his present business interests.

6. This agreement shall bind the parties hereto until the first day of January, 1929, at which time it shall terminate unless expressly continued by written agreement for a further period.

7. Neither partner may withdraw from the business an amount in excess of Two Hundred Dollars ($200) per month, and all amounts so withdrawn shall be charged against the individual account of the partner withdrawing the same.

8. All moneys of the firm shall be deposited in a convenient bank in the City of New York, subject to withdrawal only by the check of the firm, signed with the firm name by the said Edgar H. Bedell, who shall have sole charge of the finances of the firm.

9. Books of account shall be kept, and at the end of the year a statement shall be made showing the net profits for the year, and such profits shall be divided between the said partners as follows: 40 per cent of said profits to the said Bedell and 60 per cent of the said profits to the said Sutton.

10. In the event of dissolution on account of death, expiration of the term, or other cause, the parties hereto bind themselves that the partnership affairs shall be settled under the direction and according to the statements of some reputable certified public accountant of the City of Hartford.

IN WITNESS WHEREOF, the parties hereto have affixed their signatures and seals the day and year above mentioned.

EDGAR H. BEDELL [L.S.]
JOHN A. SUTTON [L.S.]

Attest:
MORRIS KENWOOD

§ 239. Results of Acting Without Contract.—In many cases of partnership there is neither a written nor verbal contract which can be proved, but the parties concerned, either intentionally or unintentionally, have acted as partners, have had a common fund in which they exercised a community of interest, and have shared profits and losses. Under such circumstances they will be held to be partners, both as between themselves and as to third persons.

This same principle applies to the case of parties who assume to be incorporated when they are not. It does not apply to those who have attempted to incorporate legally, but have failed in some point of procedure. They would be a de facto corporation and as such capable of doing business.

§ 240. **Parties.**—As partnership is strictly a contractual relation, it is essential that the parties to it be competent to contract.

If a minor becomes a partner, his acts will bind the firm, since a minor may act as agent. Should the firm become insolvent, however, the minor may take advantage of his infancy, refuse the partnership liability, and leave his associates to bear the entire burden of the partnership obligations, including those which he himself created; but he cannot withdraw the capital he has already invested in the firm, unless all of its obligations are paid.

A partnership may be entered into between two firms already existing, or between a firm and an individual, as readily as may any other contract. Under such an arrangement the profits, and in case of dissolution the assets, are divided among the component firms or parties, and then subdivided by the firms among their individual members. The individual members of both firms are personally liable to third parties.

A corporation cannot become a partner unless expressly authorized to do so by its charter. It may, however, make itself liable to third persons as a partner if it attempts to enter into partnership relations.

§ 241. **Partnership a Personal Relation.**—It must be remembered that partnership is a personal relation. Such skill and experience as one partner may possess above the others constitutes as legitimate a form of investment as any other kind of capital. In many cases these are taken as the full equivalent of the financial investments of other members of the firm. In others, they are regarded as a partial equivalent, and in still others extra abilities are recognized by a special salary or a larger percentage of profits.

As partnership is a personal relation and as one reckless partner may bankrupt his associates, the selection of partners is a vital matter. No one can be forced to accept a partner

he does not like. So a new partner may not be admitted except with the unanimous consent of the entire firm.

Because of the importance of the personnel, the death of one partner will ordinarily dissolve the firm.

§ 242. **The Firm Name.**—The usual practice where there are two partners is to use both names. If there are more than two partners, all the names may appear, though this is unusual in mercantile partnerships. Usually but one or two names appear, the other names being represented by the addition, "& Co." Professional partnerships on occasion use three and even more names in the firm title.

In the absence of statutory restriction any title that is preferred may be used as a firm name, even though it contains no partner's name, for instance, such a name as "The Ansonia Furniture Company." In New York and some other states a firm using any name other than the names of the partners or some of them, must register such trade-name together with the real names of the partners in the county clerk's office, under legal penalty. It is also illegal in New York to use the suffix "& Co." unless it represents existing or former partners. Partners may change the firm name without dissolution or any special formality, or may have more than one firm name.

All business of the firm should be done under the firm name, although a partnership may exist and be bound without any specific firm name by using the separate names of the partners. The firm signature, as "Herrick, Simpson & Co.," may be written by a partner or by any agent of the firm.

§ 243. **Kinds of Partners.**—Partners are of various kinds. There may be general, limited, dormant, and nominal partners.

General Partners.—A general or active partner is one who takes part in the management of the business, and who is liable for the firm's obligations without limitation as to amount. An active partner who wishes to withdraw from the firm

and cut off subsequent liability, must give notice to all those with whom the firm is doing business.

Limited Partners.—A limited or special partner is one who does not participate to the full in partnership liability.

Dormant Partners.—A dormant or sleeping partner is one who has invested as a partner but whose connection with the firm is secret and who has no part in the management of the business. A dormant partner has no exemptions or privileges beyond those of a general partner, except as a result of the secrecy. If his connection with the firm is discovered he is liable in exactly the same way and to the same extent as any general or active partner. Unless prevented by the partnership agreement, he may at any time assert himself as an active partner and take part in managing the firm business.

A dormant partner who withdraws without giving notice cannot be held to any subsequent liability of the firm, even thought his previous connection with it should become known. His withdrawal, however, does not free him from liability for anything done by the firm during the period of his connection with it.

Silent Partners.—The term "silent partner" is often used with much the same meaning as "dormant partner." There is, however, this difference: a dormant partner must be both "secret" and "silent," while a silent partner need not be secret. A silent partner has no voice in the management of the firm business, but may be publicly known as a partner. He is liable for firm obligations just as is any other partner, and if he withdraws, he must give notice in order to escape subsequent liability.

Nominal Partners.—A nominal partner or partner by estoppel is one who, while not really a partner, in that he has no interest in the business or profits, allows his name to be used or to appear as that of a partner. He is held liable to those

who give credit to the firm on the faith or with knowledge of his being a member. He is not, however, liable to a creditor who had no knowledge of his being held out as a partner.

Owners of a business concern which had changed from a partnership to a corporation have been held personally liable for the debts of the corporation because they neglected to notify those with whom they were dealing that the business had been incorporated.

SUBPARTNERS.—A partner may agree with an outside party to share his interest in the profits and property of the firm. Such an arrangement is termed a subpartnership. It may be entered into without the consent of the firm, and without affecting in any way its existence or operations. The subpartner is not a member of the original firm, is not liable to its creditors, and, under ordinary circumstances, has no right of accounting against it.

Davenport Woolen Mills Co. *v.* Neinstedt, 81 Ia. 226

P's salesman was negotiating a sale with A. Neinstedt, who carried on business under the name of H. & A. Neinstedt. A man present advised A. Neinstedt to make the purchase, and this man, upon the salesman's inquiry, was stated to be A. Neinstedt's father and a member of the firm. This was not true, but the father who was near-by heard the statement and did not deny it. The father was sued for the goods sold.

Held: For P. The defendant is a nominal partner. Although not a partner, he allowed himself to be held out as such and P, through its salesman, reasonably relied upon this holding out.

§ 244. Classification of Partnerships.—Partnerships may be roughly divided into two classes, general and special. While this classification covers the majority of cases, there are a few forms involving peculiarities of partnership law, such as limited partnerships and joint-stock companies, which require separate discussion.

A general partnership is the usual partnership formed for the continued prosecution of some general line of business. It is the commonest form of partnership. General partnerships may be either trading or non-trading.

Trading partnerships include all those formed for the purpose of buying, selling, and manufacturing.

Non-trading partnerships do not buy, sell, or manufacture as a principal feature of their business. These partnerships include professional partnerships, firms of brokers, etc.

A special partnership is formed for the transaction of some single piece of business, or for the conduct of some one line of business. Examples of special partnerships are as follows: a partnership to buy and sell some definite piece of land, to ship a cargo to some particular place, to buy and operate a threshing machine, to finance and sell a particular patent, or to deal in specified stocks. A common form in the present day is the syndicate organized for the promotion or financing of some large corporate enterprise. Special partnerships are called joint ventures.

A limited partnership may be formed only under special statutes. It differs from the ordinary partnership in that certain of its partners are silent, or inactive, and the liability of these partners is limited to the amount actually invested by them. These partners are called "special partners." If a partner whose liability is thus limited takes active part in the conduct of the partnership business, his status changes and he at once becomes liable as a general partner.

The restricted liability enjoyed by the special partner can be secured only by strict compliance with the statutory directions. These usually prescribe notice to the public of the formation and nature of the partnership and require that a certificate and affidavit of the limitations of the partnership be filed in some office of public registry. In all cases the local statutes should be examined, and their directions followed.

Review Questions

1. Would an oral partnership agreement be valid?
2. How does the Statute of Frauds affect partnerships?
3. A minor enters a firm, contributing $5,000 as his share of the firm capital. Six months later, while still a minor, he desires to withdraw. At that time the firm has assets of $8,000 and liabilities of $10,000. What part, if any, may he withdraw of his share of the capital? Why?
4. May two firms form a partnership?
5. May a corporation enter a firm as a partner?
6. Why is partnership held to be a personal relation?
7. What are the restrictions in New York State in regard to the use of partnership names?
8. Define the different kinds of partners.
9. Define the different classifications of partnerships.
10. A and X form a partnership under the name of A & Co., manufacturers of patented articles. X is a dormant partner. Will X be liable to a third party for the cost of raw materials supplied to the business?
11. X allows his name to be used on the stationery and on the office door of a certain firm as a member of the firm, but in reality he has no connection with the firm. Will he be liable on contracts as a partner? Will he be liable to persons who in extending credit to the firm did not rely on his apparent connection with the firm?
12. K carried on business under the name of K & Son. His son was a mere clerk and not in any sense a partner. K made a contract with X and carried out the contract. His son took no part in the performance of the contract. K sued X for the money due under the contract. The defense of A was that the proceeding was improper because the son, being a nominal partner, should be joined as a plaintiff. Was this a good defense? Explain.
13. X purchases the share of A in the firm of A, B, & C. Does this make X a partner in the firm? What rights does it give X?

CHAPTER XXX

PARTNERSHIP PROPERTY

§ 245. Nature of Partnership Property.—The partnership investment is the money or property, tangible or intangible, contributed by the partners for the purposes of the business. The original property of a partnership is derived from the contributions of the partners. When profits are made, they may be drawn out, or they may be allowed to accumulate and meanwhile may be used in the prosecution of the firm business. If retained in the business they are practically merged in the original capital, the two together constituting the partnership property.

Any property purchased with partnership funds becomes prima facie partnership property. If such property is taken in the name of a single partner, he holds it as trustee for the firm. The firm name, the goodwill of the business, and any trademarks used in the business are the property of the partnership, in which each partner has his interest.

Money or property put into a partnership *as an investment* becomes the actual property of the partnership. The partner making the investment will not, in the absence of a special agreement, be entitled to interest. He will have to look to the profits for his return.

It is always possible, however, for a partner to loan securities to his firm or to let his firm have the use of property to which he retains the right of possession and such securities or property remain his individual property. Also he may advance money strictly as a loan.

§ 246. Partnership Realty—In General.—At common law a firm as such cannot hold real estate. Hence, under the com-

mon law rule, land must be deeded to the members of a firm to hold as tenants in common, or to some individual, who is usually a member of the firm, to hold as trustee for its benefit. A conveyance of real estate to a firm by name, in cases where the firm name contains the name or names of existing members, under this rule passes a legal title to the members named, who will hold in trust for the whole firm: if no member is named in the firm title, no title passes to anyone, but the seller can later be compelled to deed to the individual members of the firm.

But the Uniform Partnership Act recognizes the partnership entity as to realty; it provides that a firm may hold real property in the firm name and as a corollary that realty may be deeded to or by the firm in the firm name.

Real property held for the benefit of the firm is, for all partnership purposes, treated as personal property. This principle is carried out completely by the Uniform Act, but at common law it is modified to the extent that the realty, after the payment of firm debts, will revert to its true character as realty and be distributed among the partners or their heirs as such. Hence a deceased partner's interest in realty held by or for the firm will not, where the Uniform Act prevails, be subject to the widow's dower but will pass to the executor as part of the personal estate; whereas in the common law states it will be affected by the dower right and will pass, subject to such interest, to the heirs.

§ 247. **Power Over Firm Realty.**—One partner does not have implied authority to transfer firm realty. As this is an unusual act, at least in most firms, it requires the consent of a majority of the partners. Hence an unauthorized transfer by one partner will not bind the firm; but if the recorded title to the property is in the name of the partner making the transfer, then the transfer would be valid in favor of an innocent transferee for value.

Where the business of a firm is the buying and selling of

real estate, such transactions being ordinary acts for such a firm, would be within the implied authority of any partner.

For a legitimate purpose a partner has also the right to pledge or mortgage the real property of the firm. He has, however, no power to sell property of the firm or to borrow money upon it for his own purposes or to pay his own debts, and anyone lending him money, or buying property from him under such circumstances with knowledge, takes no title to the property in question.

§ 248. **Power Over Firm Personalty.**—Each partner's power over the property of the firm is the same. Each is agent for all the others in everything that pertains to the care, sale, and management of the partnership property.

A partner has full power to buy and sell personal property within the scope of the partnership business, and the firm is bound by his transactions. This power does not extend to the sale of all the property used by the firm in carrying on the firm business, as such a sale would tend to destroy the partnership business. Where a sale is to be made of the stock-in-trade, or of the entire assets, or of fixtures or furniture, all of the firm should join in the assignment.

§ 249. **Goodwill.**—Goodwill is the expectation of continued patronage from old customers and of future patronage from new customers attracted by favorable reputation, advertising, publicity, etc., of the firm.

Goodwill is a valuable right and is considered as firm property.

Hence upon the death of a partner, the firm name must be disposed of and the estate of the deceased partner (even though his name did not appear in the firm name) will be entitled to share in the proceeds. Generally the surviving partner or partners will buy out the goodwill interest of the estate of the deceased partner.

The sale by a partner whose name appears in the firm name of his interest in the goodwill does not prevent him, in the absence of a specific agreement to the contrary, from opening another business under his own name, provided he does not solicit business from the customers of his former firm.

Slater *v.* Slater, 175 N. Y. 143

The firm of "J. & J. Slater" was terminated by the death of a partner. D, the surviving partner, claimed the right to the firm name. P, representing the deceased partner's estate, claimed that the name was a firm asset.

Held: For P. The firm name is a firm asset. The right to continue to use the name should be sold and the deceased partner's estate is entitled to its share of the proceeds.

§ 250. **Partner's Interest in the Partnership.**—A partner's interest in the partnership is his share in the net capital (including goodwill, of course) after the deduction of liabilities, and in the undivided profits.

§ 251. **Sale of Partner's Interest.**—Although a partner may not because of the delicate relation of mutual confidence sell his place and position as a partner in the firm, he may sell or transfer his interest in the net capital and undivided profits. The purchaser or the assignee of the partner's interest does not have the right, "prior to dissolution, to interfere in the management, to require an account of partnership transactions, or to inspect the books. He is entitled merely to the profits to which his assignor would have been entitled." (Uniform Act, § 27.)

But upon dissolution, the assignee is of course entitled to receive the partner's interest verified by an accounting.

§ 252. **Liability of Partnership Property for Debts.**—A partner's interest can be reached by attachment or by execution. This interest, however, is merely a right to a certain proportion of the surplus after debts are paid and the affairs

of the partnership are adjusted, and this is all that can be reached by legal process. The effect of the sale of a partner's interest under execution would be to give the purchaser the right to merely the same financial interest that the debtor partner had. Such a sale would usually dissolve the partnership, and make necessary a settlement of its affairs. All partnership debts must be settled before anything is set aside for a purchaser under execution.

Execution following judgment on a claim against the firm runs in the names of the individual partners, and can be levied on the partnership property, or on the individual property, of any of the partners. If it is levied on individual property, the partner to whom such property belongs has recourse against the other partners for their proportions of the debt.

§ 253. **Sharing Profits and Losses.**—The sharing of profits is an essential feature and the usual object of a partnership. Ordinarily these profits are ascertained by deducting the current expenses from the current receipts, or gross profits, or, on dissolution or any general accounting, by deducting the firm indebtedness and the original partnership investment from the total partnership assets. As there is often room for differences of opinion as to what constitutes profits, it is well to define in the articles of association how they are to be determined.

In the absence of a special agreement, the common law rule governs the division of both profits and losses. Under this the partners must share equally, without any variation, or any allowance for the greater value of services rendered, the greater amount of time devoted, or the greater investment made by one or the other of the partners. However, they may make a special agreement, that partners who devote more time or money to the business, are to receive a more nearly commensurate return. Salaries for services and interest on investments are sometimes provided for in the partnership agreement.

With reference to a claim for extra compensation by one

partner, the Supreme Court of Pennsylvania said in Lindsey *v.* Stranahan, 129 Pa. 635:

> "It is conceded that there was no express contract that he should be paid for such services, and there is no principle better settled than that the law will not imply a contract in such cases. The reason is that the partner is but attending to his own affairs. This rule is inexorable; as much so as that between parent and child. Were it otherwise, we might have a contract between the partners upon the settlement of every partnership account as to the value of their respective services. It is true this principle may work hardship in particular cases,—almost every general rule does; but that is a weak argument against the soundness of the rule. When the copartnership agreement contemplates that one partner shall manage the business or do more than his share of the work, it is easy to provide for his compensation in the agreement itself; and if no such stipulation is then made, as before said, the law will not imply one."

Health *v.* Waters, 40 Mich. 457

P's testator and D had been partners. During the year before his death, P's testator had been sick and unable to give any time to the business. D did all the work. D claimed extra compensation, although there had been no agreement for this.

Held: For P. In the absence of a special agreement, one partner is not entitled to extra compensation, even though he does all the work.

§ 254. When Interest Allowed.—Interest is allowed on capital contributions only from the date when repayment should have been made; but where a partner makes an advance beyond his share, he will be entitled to interest on such advance.

§ 255. Secret Profits.—The rule of good faith requires that all profits made within the scope of the partnership business shall be turned in for the benefit of the entire firm. If any partner violates this rule and uses his position in the firm and the knowledge he has of the business to secure any secret rebates, commissions, or other profits for himself, he will, if discovered, be held liable to the firm for the amount so realized.

If a partner uses firm funds in his private speculations he can be compelled to account for any profits. If the result is a loss, he must bear this himself, returning the partnership funds intact. This rule also applies to the use for private gain of time or skill which should be applied to the firm business.

§ 256. Right to an Accounting.—Every partner is entitled to have accurate accounts kept. The right exists whether or not any reference has been made to it in the terms of agreement. This makes it the duty of each partner to keep an accurate record of his own transactions concerning the firm business. If, as is usually the case, some one partner or some particular employee is designated to keep the firm books, it is the duty of each partner to furnish such accountant full information as to his transactions.

It is also the right of every partner to have access to the books and accounts and to make extracts therefrom.

Review Questions

1. Of what in general does partnership property consist?
2. Is a partner ordinarily entitled to interest on his investment?
3. May a partner retain ownership of property used by his firm?
4. A, B and C are partners of the firm of A & Co. Some land is deeded to the firm and the deed is made out to A & Co. Who is the legal owner? Discuss both from the standpoint of the Uniform Partnership Act and the common law.
5. A, B, and C constitute a firm doing business under the name of Union Machine Works. They buy some land and the deed is made out to the Union Machine Works. What rights, if any, do A, B, and C obtain from such a deed? Discuss both from the standpoint of the Uniform Partnership Act and the common law.
6. Discuss the right of dower of a deceased partner's widow in firm realty under the common law and under the Uniform Partnership Act.
7. Does one partner have the right to transfer firm realty? In what cases does he have this right?

8. What power does each partner have with respect to the transfer of firm personalty.
9. A firm is heavily in debt. One of the partners without the consent of the other partners gives a mortgage on land owned by the firm. He does this in order to raise money to pay the firm's debts. Will this mortgage be binding?
10. A and B as partners are operating a factory. A makes a contract to sell all the machinery in the factory. Is this contract binding on the firm? Why?
11. What is goodwill?
12. What disposition is made of goodwill upon the dissolution of the firm?
13. May a partner's interest be sold?
14. What rights are obtained by the purchaser of a partner's interest?
15. A gets judgment against X who is a member of the firm of X, Y, and Z. What rights, if any, has A to the assets of the firm? What would the procedure be in a case of this sort?
16. When a judgment is obtained against the members of a firm, can a levy be made on the individual property of one or more of the partners?
17. What is the general rule for the division of profits and losses?
18. Would this rule be altered by the fact that one of the partners had worked twice as hard as any of the others?
19. A, B, and C are partners. A buys an automobile for the firm for $1,200 but charges the firm $1,500, not divulging the actual cost. B and C find out that A has made this secret profit What would be the rights of B and C?

CHAPTER XXXI

POWERS AND LIABILITIES OF PARTNERS

§ 257. Powers of Partners—In General.—In a partnership each partner has equal authority with the others and is held to be the agent of the others, and of the firm, for any transactions within the scope of the partnership business. Hence each partner within this limit is bound by the acts, the contracts, and even the frauds of his associates, and is responsible for the obligations and liabilities so created as fully as if he had himself acted or contracted.

In the absence of special restrictions on the agency powers of the partners, they are limited only by the scope of the partnership business and by the ordinary limitations of the powers of agents. Thus, under his general powers, a partner acting alone may bind the firm in any matter properly within its business operations. He must, however, be authorized before he can bind it by executing a sealed instrument in the firm name.

It is always possible to restrict the powers of any one or all of the partners as among themselves by limitations in the articles. Such restrictions do not, however, affect third persons, unless they had received notice of them.

A single partner, by reason of his powers as an agent of the firm, may commit his associates to action against their wishes. In such case, the only remedy is to dissolve the partnership.

As to partners' power over firm property, see §§ 247-248.

§ 258. Acts Requiring Unanimous Consent.—There are certain acts that require unanimous consent of the partners. The Uniform Act has not changed the law on this phase of the subject, but it has definitely listed these acts as follows:

1. Assigning the firm property to a trustee or assignee for creditors.
2. Disposing of the goodwill of the business.
3. Doing any other act that would make it impossible to carry on the ordinary business of the partnership.
4. Confessing a judgment.
5. Submitting a partnership claim to an arbitrator or a referee.

§ 259. **Issuing Notes and Borrowing Money.**—As the average trading firm has fairly frequent occasion to borrow money against stocks of merchandise, it is implied that every member of a trading firm, may, in the absence of known restitutions, make and indorse notes, and make, accept and indorse drafts and other commercial paper in the firm name. If one of the members of the firm uses this power fraudulently or for his private benefit, the firm will be liable.

In the case of a non-trading partnership, however, it is not customary for the partners to bind the firm by issuing negotiable paper, and, unless it can be shown (1) that the partner was authorized to issue commercial paper, or (2) that in the particular business it was in accordance with usage for the partnership to bind itself in this manner, the firm is not bound.

Winship et al. *v.* Bank of the United States, 5 Peter (U. S.) 529

Winship and two others were partners in the business of making and selling soap. Winship, without the knowledge of his partners, borrowed money from the bank and signed the firm name to a note. Were his copartners liable on the note?

Held: The copartners were liable. In the case of a trading partner, it is assumed that any partner may borrow money on the credit of the firm and sign a negotiable instrument for the money borrowed.

§ 260. **Liability in Limited Partnership.**—In a limited partnership, the partner whose liability is limited can take no part in the management, and the limitations of his powers are

binding on third parties if the provisions of the laws regulating such partnerships have been observed.

§ 261. **Control by Majority.**—The majority rule in a partnership, each partner being entitled to an equal voice in the management of its affairs without regard to the amount of his investment. The majority may decide all matters of business policy and all questions relating to the general conduct of the business, and when and to what extent profits are to be divided, so far as these matters are not prescribed in the articles of copartnership. The majority must, however, in all cases rule fairly, must consult with the minority in regard to any proposed action, and must allow the minority to be heard in regard to such action. They cannot apply the capital to new undertakings outside the scope of the partnership business, nor can they seek their own interest as against the common interest.

Where the partners are evenly divided concerning any proposed action, a deadlock results and those who want to make a change are at a disadvantage. In a partnership of two no change can be made and no new action undertaken unless both can agree. Where articles exist no change can be made in any part save by unanimous consent of all the members of the partnership.

§ 262. **Liabilities to Copartners.**—Partnership is practically a personal relation, and those who enter it are expected to act honestly and fairly toward their associates. No partner may seek his own advantage at the expense of his associates, nor may he make any personal and private profit out of a transaction in the line of the partnership business. All transactions must be for the common good, and in important matters a partner should consult his associates before taking action.

A partner will not be allowed to retain an unfairly made profit, nor to compete with his firm. He may, unless expressly restricted by his partnership agreement, carry on an independent non-competing business of his own, provided that

it does not interfere with his duty to his firm. Any profit made in a competing business, or in a business that did interfere with the firm business, would be held to have been made for the firm, and the other partners could compel their associate to account for his unfair profits.

In the absence of any restrictions in the articles, a partner may give to non-competing ventures time which might have been devoted to partnership affairs. He may also use information acquired by him in the partnership business in his private undertakings, provided these latter are not within the scope of, and do not compete with, the business of the firm.

A partner who has made payments of his own funds for the firm or who has incurred personal liabilities is entitled to indemnification.

Care, prudence and skill are qualities that a partner is expected to exercise to the same extent as others in the same line of business, but he is not responsible for ordinary mistakes of judgment.

Exchange Bank of Leon v. Gardner, 104 Iowa 176; 73 N. W. 591

P sued D to recover $15,000 for poor investments made by D as a partner of P's banking firm. D acted honestly but with poor judgment in making the investments.

Held: For D. Although it was the duty of D to act in good faith and with the same degree of care and skill as is shown by business men in the management of such business, he was not liable for honest errors in judgment nor for the failure to take the utmost possible precautions in making investments.

§ 263. Liabilities to Firm Creditors.—Where a partnership is admitted or proved, and where a contract within the scope of the partnership business has been made by a partner, each individual partner is liable, and in case judgment is had against the firm, executions may be levied on the firm property, or on the separate property of any one of the partners. That is, the creditors may take judgment against all the partners and may then proceed to collect their claims from firm assets

or from the property of any one or more of them, leaving the partners to adjust the matter between themselves afterward as best they may.

A partner is liable in damages for the torts, frauds, and wrong-doing of his partner within the scope of the partnership business, but usually he will not be held criminally liable.

§ 264. Rights of Separate Creditors.—A partner's separate or individual creditors can proceed only against the separate estate of the partner. Hence such creditors cannot attach or levy under a judgment on the firm property. But the partner's income from the firm can, by appropriate court proceedings, be applied to the judgment or, if necessary, the interest can be sold and the proceeds applied in the same way.

Review Questions

1. What is the usual scope of a partner's authority?
2. When are third persons affected by restrictions upon the authority of a partner?
3. What acts require unanimous consent of all the partners?
4. A, B, and C are partners in the clothing business. A gives a note for some cloth purchased by the firm. He signs the firm name to the note without consulting his copartners. Would the firm be liable on the note?
5. Assume that A buys an automobile. The seller has reason to believe that A is buying it for the firm of A, B, and C, but in reality A is buying the automobile for himself. A gives a firm note. Would the other partners be liable on this note?
6. X and Y constitute a law partnership. X borrows money to buy furniture and signs the firm name to a note. Would Y, who knew nothing about the note, be liable on it?
7. What is the status of a limited partner?
8. A, B, and C are carrying on a manufacturing partnership. A and B desire to enlarge the business by starting a new factory. C objects. What are the rights of the parties?
9. May a partner carry on a separate business?
10. What is the extent of diligence, care, prudence and skill that a partner is entitled to expect from his copartners?

11. What property may be levied upon under judgments against a firm?
12. A, B, and C constitute a partnership. A, in selling some merchandise for the firm, makes false representations amounting to fraud. Would B and C be liable for the fraud of A?
13. What are the rights of the separate creditors of a partner?

CHAPTER XXXII

DISSOLUTION AND WINDING UP

§ 265. Dissolution in General.—A partnership usually has a shorter duration than a corporation. The underlying reason for this is that a corporation is an impersonal thing, whereas a partnership is intensely personal. Most states put no restrictions on the life of a corporation. A partnership is generally limited by the agreement of the partners to a certain number of years. Even without such limit, it would terminate on the death or withdrawal of any one partner, unless there were special provisions in the partnership agreement to the contrary.

§ 266. Dissolution by Agreement.—Upon the expiration of the term limited by the partnership articles, the partnership will automatically terminate and will be dissolved in any particular manner prescribed by the articles, or, in the absence of such provisions, in accordance with the prevailing legal rules. If the partners pay no attention to the time limit and continue to operate the firm after the limit has been passed, it becomes a partnership at will.

A dissolution may be had at any time, by unanimous agreement regardless of the period fixed by the articles. If any of the partners wish to continue the business, they may buy out partners who wish to retire. A dissolution by agreement usually involves an express agreement, but the agreement may be implied. If a manufacturing firm sells its machinery and factory so that it has no place of business and ceases operations, a dissolution will be implied.

Seufert *v.* Gille, 230 Mo. 453

D and V, who were partners, formed a corporation to which they transferred all the assets of the firm. Later V signed the firm name

to a note in favor of P. D did not consent to the giving of the note.

Held: For D. The partnership was dissolved when it transferred its entire assets to the corporation.

In many cases the most satisfactory method of disposing of of a partnership business is by incorporation. The practice of transforming partnerships into corporations is very common.

§ 267. **Enforced Dissolution.**—There are many things that may bring about an enforced dissolution:

1. Express Will of Any Partner.—If a partner wishes to terminate his partnership relations, he may do so at any time simply by giving notice to the members of his firm, to those dealing with the firm, and to the public generally. Where the duration of the firm is not limited, it may properly be dissolved at the will of any one partner. Even though there is a definite duration, any partner may, in advance of the time limit, break up the firm. This would be a breach of the agreement: it would be wrongful and subject the guilty partner to damages. But it can be done. The reason is that the law will not force partners to work together, because this would be contrary to the general legal principle that the courts will not enforce contracts for personal services.

2. Expulsion of a Partner.—Ordinarily a partner cannot be expelled. If his associates do not like him, they may dissolve the firm and form a new firm among themselves. This achieves the same result but it does not have the odium of an expulsion. However, the articles may permit the expulsion of a partner. When the power of expulsion is exercised, it works a dissolution.

3. Illegality.—A partnership will be dissolved by operation of law upon the passing of any statute or the happening of any event that makes the continuance of the business illegal. The outbreak of war will terminate a partnership if the partners are residing in the warring countries.

4. Death.—The death of a partner terminates a partnership. The reason for this is the importance of the personal element. However, it is lawful to provide in the articles for the continuance of the partnership despite the death of a partner.

5. Bankruptcy.—The bankruptcy of a partner will dissolve the firm because his copartners naturally will not care to go along with an insolvent partner. On the other hand the bankruptcy of the firm will not automatically bring about its dissolution. It may effect a compromise with creditors or secure a discharge in the bankruptcy proceedings.

6. Judicial Decree.—There are certain causes of dissolution that require judicial examination and decision. They are discussed in the next section.

§ 268. Dissolution by Judicial Decree.—The causes of dissolution requiring judicial decree are the following:

1. Insanity.—If a partner becomes insane, the other partners or any one of them may secure a decree of dissolution; but if the insanity appears to be temporary, the decree will not be granted until the mentally sick partner has had an adequate chance to recover.

2. Incapacity.—If it is clearly proved that any partner lacks the health, physical strength, intelligence or special skill to carry on his share of the work, the court will dissolve the firm upon the application of any of the other partners.

Barclay *v.* Barrie, 209 N. Y. 40

P sought a judicial dissolution because of the permanent incapacity of his copartner due to paralysis.

Held: For P. D could not perform his duties.

3. Misconduct of a Partner.—If one partner is guilty of a wilful and persistent breach of the partnership articles, bad faith or misconduct so serious as to affect the credit and suc-

cess of the business or to make it impossible for his associates to work with him, there is good ground for dissolution.

4. Failure of Business.—Where it becomes apparent that only loss can result from the further prosecution of the business, the courts, at the request of any partner, will order a dissolution in order to save what remains.

5. Sale of Partner's Interest.—A judicial dissolution may be obtained by the purchaser of a partner's interest at any time in the case of a partnership at will; otherwise after the termination of the specified term of the particular undertaking.

§ 269. Procedure in Judicial Dissolution.—The partner who petitions for a dissolution will usually also ask for an accounting, because an accounting is a necessary part of the dissolution proceedings unless a settlement has been agreed upon. The usual procedure is to appoint a referee or to refer the accounting to a Master in Chancery to examine and report the terms of the partnership, the accounts that have been kept, the capital invested and withdrawn, the profits and the losses, the assets and liabilities, and the proportion in which these should be shared among the partners. When the report is received, the court will order the taking of appropriate action.

The petitioning partner may be granted an injunction restraining the other partners from undertaking new obligations, from interfering with or disposing of firm property, or from continuing to carry on the firm business. The appointment of a receiver is an extreme measure that the courts are loath to grant and it will be allowed only when the interests of some member of the firm or of outside creditors are in urgent need of protection.

Repass *v.* Central Trust and Safe Deposit Co., 112 Ky. 606

P and S were partners in bookmaking, i.e., making wagers on race horses. S died, leaving $4,000 in the bank. This deposit was in fact the "bank roll" of P and S, in which they had equal interests. P sued D, which was S's executor, for an accounting.

Held: For D. The business was illegal and the court will not grant an accounting for an illegal partnership.

§ 270. **Effect of Dissolution—In General.**—The dissolution of a partnership does not mean its immediate termination. It must continue in existence until its affairs are wound up. The accounts receivable must be collected, the property sold, the debts paid, and all transactions begun before dissolution must be completed. Accordingly a dissolved partnership will remain in existence legally until it is fully wound up.

§ 271. **Authority of Partners After Dissolution.**—Upon dissolution, the general authority of the partners ceases. However, the surviving or liquidating partners will continue to have such authority as may be necessary to wind up the business, and this involves carrying out contracts entered into before dissolution.

§ 272. **Who May Wind Up Partnership.**—Where one or more partners have wrongfully caused a dissolution, the other or innocent partners will have the right to wind up the firm affairs.

Where the dissolution has been caused by death, bankruptcy, or judicial decree on the ground of incapacity, the remaining partners will be entitled to liquidate the firm.

In rare cases the court will appoint a receiver to handle the winding up process.

§ 273. **Disposition of Firm Assets as Between Partners.**—Where the dissolution does not involve any breach of the partnership agreement, each partner has as against his fellow partners, the right to have the firm property applied to pay firm debts and the surplus used to pay the partners the net amounts due them. In the absence of any special agreement between the partners, the order in which the firm assets would be applied, is as follows:

1. To firm creditors.
2. To partners for loans and advances.
3. To partners for contributions of capital.
4. To partners for shares of profits.

Of course, if the firm assets are insufficient to meet liabilities, the partners must contribute to pay the losses in their respective proportions.

§ 274. Liability of Partner to Copartners for Wrongful Dissolution.—Where there has been a wrongful dissolution, the innocent partners, in addition to having the right to have the firm assets applied as explained in the last section, also have the right to claim damages from the partner or partners who have been guilty of a breach of the partnership agreement.

If a partner after dissolution wrongfully purports to act for the firm, he may or may not (see § 277) make the firm liable. But as between himself and his copartner, he will have to shoulder any liabilities incurred.

There is an exception to this last statement. Where the dissolution is caused by the death or bankruptcy of a partner or by the act of a partner in dissolving the firm, the responsibility for the act of any partner who without knowledge or notice of the dissolution acts for the firm will be shared by all the partners.

§ 275. Continuation of Business After Dissolution.—Where the dissolution was wrongful, the innocent partners may continue to conduct the business under the old name. They may also possess the partnership property, provided they pay the offending partner the value of his interest less any damages due for his wrongful act or give him a bond (approved by the court) for the amount due.

In determining the interest of the wrongful partner, no allowance will be made for goodwill. He forfeits his goodwill interest because of his misconduct.

Where the dissolution does not involve any breach of the firm agreement, any partners who desire to continue the business will have to buy out the goodwill interest of the others.

§ 276. Firm Liabilities Incurred Prior to Dissolution.—Upon the dissolution of the firm, all the partners remain responsible for all firm liabilities contracted before the dissolution. The partners cannot, by going out of business, discard their liabilities, as they would an old coat. "Where a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past the partnership continues."

The agreement between the partners that one or more of them will assume all the firm obligations does not bind the creditors. If A, B and C are liable as partners and on dissolution they agree that A and B will shoulder all the obligations, the creditors may properly say: Our claims run against C as well as A and B and we do not intend to be restricted to A and B only.

If a creditor consents to such an arrangement, it will be binding even though theoretically it is difficult to find any consideration for his release of one of the debtors. The creditor's consent to the taking over of the firm liabilities by one or more of the partners may be implied from the course of dealing between the parties; but the creditor's knowledge of the transfer without objection will not amount to consent.

A creditor who, knowing of the transfer, consents to any extension or alteration of his claim, will be regarded as assenting to the transfer.

The discussion in this section applies also and with equal effect to cases where the firm has been taken over by outsiders who have agreed to assume all liabilities.

§ 277. Firm Liabilities Incurred Subsequent to Dissolution.—Partners will be liable to third persons for liabilities incurred after dissolution only in the following classes of cases:

1. Transactions pertaining to winding up. If the act done or the contract made was appropriate to the winding up of the business it will be binding on all partners.

2. Transactions with former creditors. The firm will be bound on any transaction within the scope of its former business, with a person who formerly had given credit to the firm and did not have actual knowledge of the dissolution.

3. Transactions with other persons. The firm will also be bound on any transaction within the scope of its former business with a third person other than a former creditor, if notice of the dissolution had not been advertised, and if such third person did not know of the dissolution.

§ 278. Necessity of Giving Notice of Dissolution.—In order to avoid the liability outlined in the preceding section, notice of dissolution should be given.

To all former creditors actual notice should be given. The mailing of a written or printed notice is sufficient provided it is received.

To other third parties who know of the firm but have never extended credit to it, constructive or newspaper notice is sufficient. The advertisement need be published only once but it should be in a newspaper of general circulation in the place or in each place if the business is conducted in more than one place.

§ 279. Liabilities of New Partners.—When a new partner comes into a firm, he becomes liable for all obligations incurred by the firm prior to his admission, but only to the extent of his share in the firm assets.

§ 280. Creditors of Old and New Firm.—When a firm is dissolved but its business is continued without liquidation, then the old creditors will be creditors of the new firm. This is true regardless of the complexion of the new firm or the cause of dissolution: if there is no liquidation, the assets will be subject equally to the claims of both classes of creditors.

§ 281. **Rule of Marshaling.**—As between firm and individual creditors, the rule of marshaling applies. This means that firm assets go to firm creditors and the individual assets of the partners to their individual creditors.

If there should be a surplus of firm assets after paying off all firm creditors, this surplus would be divided among the partners according to their respective shares and the individual creditors of any partner could then have his share of the firm surplus applied to their claims.

On the other hand, if the firm lacks sufficient assets to meet its obligations, and one or more partners have a surplus after paying their individual creditors, such surplus will go to met the firm deficit.

Review Questions

1. What is the effect of continuing a partnership after the time fixed in the agreement?
2. A and B sign a partnership agreement to last five years. May either A or B terminate the partnership before the expiration of the five years? May they by mutual agreement terminate the partnership before the expiration of that period? How?
3. If A died before the five years expired, would his estate have to continue the partnership?
4. How may it be arranged to continue a partnership after the death of a partner?
5. What are the grounds for seeking dissolution by judicial decree?
6. Explain the procedure usually followed in dissolution proceedings.
7. What is the status of a firm while it is in course of dissolution?
8. Who may wind up a partnership?
9. As between the partners, how will the firm assets be disposed of?
10. Discuss the liability of a partner to his copartners for a wrongful dissolution.
11. When will creditors be bound by a transfer of firm liabilities?
12. When will partners be liable for obligations incurred subsequent to dissolution?
13. Is it desirable that a partner give notice when he withdraws from a firm? How should such notice be given?
14. What is the liability of an incoming partner?
15. What is the rule of marshaling?

Corporations

CHAPTER XXXIII

NATURE OF CORPORATIONS

§ 282. **Corporate Entity.**—A corporation is an artificial person, created or authorized by the law for some particular purpose or purposes. It has, therefore, only those rights and powers which are given it by the law. These vary in the different states but are in all cases sufficient for the demands of ordinary business.

A corporation is usually composed of a number of persons associated together, though it may, and sometimes does, consist of but one or two members. These members, or stockholders, are not the corporation. They compose it, but the corporation has a name, an entity, and an existence of its own, entirely apart and distinct from that of these members. Under its corporate name it may conduct business, make contracts, and bring suit. So absolutely different is the corporation's existence from that of its stockholders that it may enter into contracts with them and sue or be sued by them.

Button *v.* Hoffman, 61 Wis. 20; 20 N. W. 667

P brought an action to obtain possession of property belonging to a corporation. D contested P's title to the property. P testified "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company and I am the company."

Held: For D. The property belonged to the corporation, not to P. The owner of all the stock of a corporation does not own its property. While the corporation exists he is a mere stockholder and nothing else.

§ 283. **Classification.**—A logical classification is that which separates all corporations into (1) public, and (2) private corporations.

Public corporations are those formed by the legislature for governmental purposes, as cities, villages, and towns. These are called "municipal corporations."

All other corporations are private corporations.

Corporations formed to conduct public utilities, such as railroad, navigation, and telephone companies, or to supply water, gas, and electricity, if they are conducted for private gain, are properly classed as private corporations. However, they are often referred to as quasi-public corporations; and because of the public interest involved are often subject to close governmental regulation.

Private corporations may be divided into corporations without capital stock and corporations with capital stock.

§ 284. **Corporations Without Capital Stock.**—Most religious, educational, charitable, and social organizations belong to this class. They are non-stock, or membership corporations. In some cases certificates of membership are issued to the members, but these are not stock certificates and are not usually transferable. When corporate action is taken, each member has one vote without regard to the amount of his financial interest, if any, in the corporation.

§ 285. **Corporations With Capital Stock.**—Stock corporations have a capital stock divided into shares, usually of like amount, which are evidenced by transferable certificates of stock. These stock certificates are issued to the members of the corporation, who are termed "stockholders," the certificates evidencing the number of shares which each owns.

The ultimate control of the corporation rests with the stockholders, who act in meetings and by vote. Each share of stock usually entitles its owner to one vote in stockholders' meetings; hence those owning a majority of the shares control

the corporation. When profits are to be divided, they are distributed among the stockholders in proportion to the number of shares owned by each.

Because of the convenience of the system, all corporations intended for profit are organized as stock corporations.

§ 286. **Distinctive Features.**—The distinctive features of a modern stock corporation may be summarized as follows:

1. Its creation and regulation by the state.
2. The limitation of the corporate powers to the objects specified at the time of its creation.
3. The limitation of the liabilities of the stockholders.
4. The distinct entity of the corporation for all legal and business purposes.
5. The permanence of its organization.
6. The representation of the interests of the stockholders in the corporation by transferable shares of stock.
7. The corporate mechanism of directors, officers, and agents, working under definite rules of action.

These features are possessed by every stock corporation, and every organization possessing them is a stock corporation.

§ 287. **(1) Creation by the State.**—A partnership may be formed by the mere agreement of the parties. A corporation, on the contrary, may be created only by the state. Formerly each corporation was created by a separate legislative enactment. Today the formation of corporations is governed by general laws. These laws vary in minor details in the different states. All are alike in their general plan and scope.

§ 288. **(2) Limited Powers.**—An individual or a partnership may engage in any business that seems best, and may change from one business to another at pleasure. A corporation, on the contrary, is limited to those purposes enumerated in its charter. If it desires to engage in any other business, it must amend its charter.

§ 289. (3) **Limited Liability.**—Subscribers to the stock of a corporation are liable to the corporation for their subscriptions. If these have not been paid, the corporation, or its creditors in case of its insolvency, can compel payment. Also if subscriptions are accepted by the corporation at less than par, corporate creditors can usually force payment of such additional amount as will render the stock full-paid. (See § 322.) Beyond this liability, known as the subscription liability, stockholders have in most states no individual liability for any indebtedness of the corporation.

§ 290. (4) **Legal Entity of Corporation.**—The distinct legal entity of the corporation may best be shown by a comparison between corporations and partnerships. The difference is radical.

A partnership is merely a collection of all the individual partners. Hence each partner represents the partnership fully, can make contracts for it without consultation with other partners, and can bind it by his action. On the other hand, he cannot contract with his partnership, bring suit against it, or be sued by it, any more than he could so act with or against himself.

A corporation, on the contrary, is itself a legal entity, distinct from its stockholders. These stockholders as individuals do not represent it, cannot make contracts for it, nor bind it in any way. Each may, however, deal with the corporation as with a stranger, may contract with it, may sue it, may be sued by it.

§ 291. (5) **Permanence.**—A partnership may be dissolved at any time, at the will of any partner, and is necessarily dissolved if a partner dies, becomes insolvent, or sells out to a stranger. A corporation, on the contrary, continues for the term of its existence, uninterrupted by the dissatisfaction, financial embarrassment, death, or retirement of its stock-

holders. Its entire membership may change again and again, but the corporation continues.

§ 292. (6) Stock System.—The division of the stock of the corporation into shares represented by stock certificates, transferable by indorsement, is one of the most convenient features of the modern corporate system. It permits the investment of varying amounts, and gives each investor his proper proportionate interest both in the management and in the resulting profits of the business. It permits a ready sale of part or all of the stockholder's interests to some other investor. In case of his death it renders the transfer or division of his interest a simple matter. It is in striking contrast to the difficulty of transferring an interest in an ordinary partnership.

§ 293. (7) Corporate Mechanism.—A corporation is created by the grant of a charter from the state, which in general terms defines the rights and powers of the corporation. After this charter has been allowed, the incorporators hold a meeting and adopt by-laws which lay down the lines along which the business of the corporation is to be conducted. The stockholders elect a board of directors, which, subject to the regulations of the charter and by-laws, controls and manages the business and property of the corporation.

The directors at their first meeting elect officers and take such other action as may be necessary to inaugurate the corporate activities. Thereafter they hold their meetings from time to time as may be required by the by-laws or the necessities of the business.

§ 294. (8) Attractiveness to Investors.—As a consequence of the advantages enumerated, and because of the liabilities and inconveniences of a partnership, the corporate form is peculiarly attractive to the investing public. Created by the state for a fixed period, it is not liable to sudden or unex-

pected termination. The rights and liabilities of all concerned are defined by law and well settled by custom. It permits investment to a definite extent without indefinite or continuing liability and without the necessity of the investor's becoming identified with the management.

Review Questions

1. Define "corporation."
2. Will the corporation continue to exist when all the stock of the corporation is issued to one man?
3. Does a man who is the sole owner of the corporation and who carries on the business single-handed have the right to sue on the contracts of the corporation in his own name?
4. Give illustrations of corporations without capital stock.
5. In such corporations how is the voting power arranged?
6. What are certificates of stock?
7. In stock corporations, how are the profits divided?
8. In stock corporations, how is the voting power arranged?
9. What are the differences between a corporation and a partnership?
10. What are the advantages of organizing a business as a corporation instead of as a partnership?
11. What may be the disadvantages?

CHAPTER XXXIV

INCORPORATION

§ 295. The Charter.—The terms "certificate of incorporation," "articles of association," etc., are synonymous with the older and briefer word "charter." A charter is the formal authority from the state for the existence of a corporation. It is to the corporation what a constitution is to a civil government. It is the foundation upon which the corporate structure is built. The charter creates the corporation and authorizes certain specified individuals to organize it and conduct its operations.

§ 296. Application for Incorporation.—In former days a grant of a special charter would be made to specified persons, authorizing them to conduct some particular enterprise under the corporate form. Usually these charters conferred some franchise or special privilege, as the right to erect a toll bridge, establish a bank, construct a railroad, or build a dam.

The abuses which arose from this method of granting charters have resulted in most states in the establishment of general laws under which corporations may be formed for any legitimate purposes, by any qualified persons upon compliance with prescribed formalities. In some few states special charters are still granted on occasion.

The form of application for a charter under these general laws is usually merely a copy of the charter desired. The charter application when allowed becomes itself the charter.

§ 297. Provisions of Charter.—The provisions customarily required in the charter are the following:

1. Name of corporation.
2. Purposes of corporation.

3. Duration of corporation.
4. Location of corporation.
5. Capitalization.
6. Names of incorporators.

In some states certain additional provisions are required, such as the names of the directors for the first year.

In the following sections those various provisions are discussed.

CERTIFICATE OF INCORPORATION
of the
PIEDMONT SCALE COMPANY

We, the undersigned, all being of full age and two-thirds being citizens of the United States and one of us a resident of the State of New York, for the purpose of forming a corporation under the Business Corporations Law of the State of New York, do hereby certify and set forth:

First—The name of said corporation shall be

"PIEDMONT SCALE COMPANY."

Second—The purposes for which said corporation is to be formed are as follows:

(a) To manufacture, buy, sell, import, export, and generally deal in and with scales, weighing machines, and mechanical devices for weighing, measuring, and recording the weight and measurement of all kinds of goods and merchandise.

(b) To apply for, obtain, purchase, or otherwise acquire, and to register, hold, own, use, operate, sell, assign, or otherwise dispose of and turn to account and profit, any and all trade-marks, improvements, inventions, tools, apparatus, mechanisms, and machinery, useful or necessary in the operations of the Company, whether secured under letters patent of the United States or of any foreign country, or held or secured in any other manner.

(c) To take, lease, hire, purchase, manufacture, or otherwise acquire and own, and to sell, hire, lease, pledge, mortgage, and otherwise deal in and with all kinds of goods, wares, chattels, merchandise, and other personal property, excepting gold and silver bullion, foreign coins, and bills of exchange.

Third—The amount of capital stock of said corporation shall be Five Hundred Thousand Dollars ($500,000).

The amount of capital with which said corporation will begin business is Five Hundred Dollars ($500).

Fourth—The number of shares of which said capital stock is to consist shall be Five Thousand (5,000) Shares of the par value of One Hundred Dollars ($100) each.

Fifth—The principal office of the corporation shall be in the Borough of Manhattan and in the City, County, and State of New York.

Sixth—The duration of said corporation shall be perpetual.

Seventh—The number of directors of said corporation shall be three.

Eighth—The names and post-office addresses of the directors for the first year are as follows:

NAMES	ADDRESSES
Howard Maxwell	510 West 176th Street, New York City
Howard J. McCall	270 Broadway, New York City
Edward Blashfield	30 Broad Street, New York City

Ninth—The names and post-office addresses of the subscribers to this certificate and the number of shares which each agrees to take in said corporation are as follows:

NAMES	ADDRESSES	SHARES
Howard Maxwell	510 West 176th Street, New York City	460
Howard J. McCall	270 Broadway, New York City	20
Edward Blashfield	30 Broad Street, New York City	20

Tenth—At all elections of directors of this corporation, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock, multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them, as he may see fit.

IN WITNESS WHEREOF, we have made and signed this Certificate in duplicate, this 27th day of August, in the year One Thousand, Nine Hundred and Twenty-five.

HOWARD MAXWELL
HOWARD J. McCALL
EDWARD BLASHFIELD

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss:*

Personally appeared before me this 27th day of August, 1925, Howard Maxwell, Howard J. McCall, and Edward Blashfield, to me personally known to be the persons described in and who executed the foregoing certificate, and severally acknowledged that they executed the same for the purpose therein set forth.

{NOTARIAL SEAL}

OSCAR JACOBS,
Notary Public, Suffolk County, N. Y.
Certificate filed in New York County.

§ 298. **Name of Corporation.**—Names like, or nearly like, those of corporations already rightfully doing business in the particular state may not be selected as the corporate name. In some states all corporate names must begin with "The" and end with "Company." In others the name must be followed by "Limited" or "Incorporated." In other states, firms may become incorporated under the partnership name without change or addition of any kind.

§ 299. **Purposes.**—The purposes for which a corporation is to be formed must be set forth in the application. They must be permitted by the laws of the particular state. Ordinary business corporations are allowed much latitude in stating their purposes and are not usually confined to one

business or line of activity. However, a few of the states are very strict and require the charter to limit the corporation to a certain field.

§ 300. **Duration.**—In some states the duration of corporations is limited to some fixed maximum as twenty, thirty, or fifty years. In most states, however, while a corporation may be limited to any term specified by its charter, it is permissible to make its duration perpetual.

§ 301. **Location.**—A corporation must have its principal office in the state in which it is incorporated. This, however, is a formality, because the so-called principal office may in fact be only a dummy office. The location of the office must usually be specified in the application for its charter.

In the state of its incorporation the company is a "domestic" corporation. Elsewhere it is a "foreign" corporation. In its own state it has certain legal rights as an incident of incorporation. In other states it has no such rights except as a matter of courtesy or such as may be granted there by legislation.

St. Clair et al. *v.* Cox, 106 U. S. 350

The question was as to the validity of a state law providing for service of process on officers and agents of foreign corporations doing business therein.

Held: The statute is valid. When a foreign corporation sends out its officers and agents into other states and carries on business there, it must be held responsible in the courts of those states.

§ 302. **Capitalization.**—The authorized capital stock of the proposed corporation must be specified in the charter and may be changed thereafter only by an amendment of the charter.

This statement should set forth the number and the nature of the stock, and if there is to be more than one class of stock, the rights of the different classes, and usually also the amount of

capital to be paid in at the start or within a certain set period, as the law of the state may require.

§ 303. **Incorporators.**—The parties applying for a charter must be competent persons of full age, and ordinarily some proportion of them must be citizens of the state in which the application for a charter is filed. Minors, firms, or corporations, and generally persons not able to contract, are not competent parties, though they may usually hold stock after the corporation is formed. The minimum number of applicants is in most states three, though in some few states five are required. Each incorporator must ordinarily subscribe for one or more shares of stock and all must sign and acknowledge the application.

§ 304. **Procedure for Incorporation.**—The charter, having been executed by the incorporators, is sent to the Secretary of State along with the required fees. If it is in proper form, it will be allowed by the Secretary and filed in his office. In a few states it is necessary to anticipate this step by giving public notice through newspaper advertising of the intention to apply for a charter and of the scope of the proposed charter.

A certified copy or a duplicate original of the charter accompanied by a statement of the allowance of the charter is then filed in the office of the clerk of the county in which the corporation has its principal office.

These steps simply give the corporation the right to exist. It will not have complete legal existence until the incorporators' meeting and the initial meeting of the board of directors have been held. The incorporators adopt a set of by-laws and elect the directors, unless as required in some states, the directors for the first year are named in the charter. The board of directors in their first meeting usually elect officers and authorize the making of any contracts required to get the corporation actually under way.

§ 305. **Amendment of Charter.**—Any corporate right or privilege that might have been secured in the original charter of a corporation may, in most of the states, be secured by charter amendment, and such amendment may be made at any time, even before the organization of the corporation is completed.

As a preliminary step, amendments of the charter usually require the assent of at least two-thirds of the outstanding stock of the corporation in the manner prescribed by law—usually by vote at a regularly called meeting. The amendment so authorized is then as a rule filed in the same offices and with the same formalities as the original charter, becoming effective as soon as allowed and filed.

§ 306. **De Facto Corporations.**—A corporation organized in accordance with all legal requirements is a corporation "de jure," i.e., by right. When one or more of the legal requirements are omitted, there may nevertheless have been a substantial and practical compliance with the chief legal requisites so that the result will be a corporation "de facto," i.e., in fact. If the organization is seriously incomplete from the corporate standpoint, it will be treated as a partnership and the promoters held as partners.

The essentials of a de facto corporation are the following: (1) a law under which such an organization might be incorporated; (2) a bona fide attempt to incorporate under such a law; and (3) an assumption and exercise of the powers of a corporation.

Vanneman *v.* Young, 52 N. J. Law 403

P sued to hold the members of a corporation liable as partners. They went through all the operations of forming a corporation except that they did not file the certificate of incorporation with the secretary of state, as required by law.

Held: For D. "Where the law authorizes a corporation, and there is an effort in good faith to organize under the law, and, as a

result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation de facto."

Review Questions

1. What is a charter?
2. Why is it desirable that a corporation be organized under general instead of under special laws?
3. What are the usual provisions required in the charter?
4. What are the restrictions with regard to corporate names?
5. In setting forth the corporate purposes in the charter, is it desirable to widen or to narrow the scope of the corporation's possible activities.
6. What is the difference between a domestic and a foreign corporation?
7. What is the usual procedure for forming corporations?
8. What are the essentials of a de facto corporation?

CHAPTER XXXV

CORPORATE POWERS

§ 307. **Charter Powers—General.**—The grant of a charter bestows upon a corporation all the powers properly specified in the application for a charter. In addition to these specified powers—which are usually those necessary to conduct the business or enterprise to be undertaken by the corporation—the charter confers certain general powers, whether specified or not. These general powers are as follows:

1. To sue and be sued.
2. To use a seal.
3. To buy, sell, and hold property.
4. To appoint directors, officers, and agents.
5. To make by-laws.
6. To dissolve itself.
7. To do all things necessary.

These powers are discussed in order in the following sections.

§ 308. **(1) To Sue and Be Sued.**—When a partnership is sued each partner must be named separately and be made a party to the action. A corporation may sue or be sued under its corporate name just as may an individual. No mention need be made of its stockholders. A summons may be served on any managing officer, on any director, or on an agent in charge of the corporate affairs.

§ 309. **(2) To Use a Seal.**—Formerly the seal was the essential feature of the corporate signature. Now the corporate signature may be affixed by any properly authorized agent without the use of the seal, save in those few cases where an

individual must use a seal, as in the conveyance of real estate or the execution of a bond.

The custody of the seal usually rests with the secretary of the corporation.

§ 310. **(3) To Buy, Sell, and Hold Property.**—This power must be taken with some qualifications. The property must be such as pertains to the business of the corporation and such as it is permitted to hold under the laws. In some states the ownership of land by corporations is restricted.

§ 311. **(4) To Appoint Directors, Officers, and Agents.**—This power is absolutely necessary as the corporation can act only through such representatives. The stockholders at their annual meeting elect directors who have charge of and manage the corporate affairs. These directors then meet and elect a president, a treasurer, a secretary, and such other officers as may be desired. Agents may be appointed by the directors or by the officers, when authorized thereto.

§ 312. **(5) To Make By-Laws.**—The by-laws are adopted by the stockholders. They are the working rules of the corporation and provide for the details of its operation. The by-laws are subordinate to the laws of the state and to the charter of the corporation, and their provisions must not be inconsistent with either. Under this limitation, however, the by-laws have wide scope.

§ 313. **(6) To Dissolve Itself.**—When a corporation has failed in its object, or has become unprofitable, or has completed its intended purpose, or has disposed of its business and property, its dissolution may become desirable. Formerly the unanimous consent of all the stockholders was generally required for dissolution. Now in most states some specified majority of the stockholders by simple statutory proceedings may dissolve the corporation. In such case the assets are

sold, and, after payment of any corporate debts, any remaining funds are divided pro rata among the stockholders.

§ 314. (7) To Do All Things Necessary.—A corporation organized for some specified purpose has the legal right to make all contracts and do all proper things necessary to carry out that purpose, for instance, a corporation organized to build and operate a factory would without special authorization thereto have the right to buy and hold the real estate required for the erection of its plant.

§ 315. Incidental Powers.—Aside from the general powers, the corporation will ordinarily have these incidental powers:

1. To borrow money when necessary to carry out the purposes of the corporation.

2. To buy its own stock, provided it does so in good faith and out of surplus. In a few states, however, this is not permissible under any conditions.

3. To acquire stock in another corporation. One corporation may always take stock in another corporation in payment of a debt and unless there is a prohibitory statute may buy stock of another corporation in the same line of business provided the purpose is not to create a monopoly or to stifle competition.

§ 316. Charter Powers—Special.—The special powers of a corporation are those specifically mentioned in its charter which, if not so mentioned, it would not possess. The usual purposes for which corporations are formed, with their amplifications, are included among these, but in most states the law allows many further powers that add much to the value of the corporate system.

Among these may be mentioned provisions as to the issue of preferred and other special stocks, the system of cumulative voting, the power to hold stock of other corporations, etc. Also restrictions of various kinds may be embodied in the charter, such as limitations on salaries to be paid officers, or

restrictions on the power to mortgage the corporate property or to contract indebtedness generally.

§ 317. **Contracts Ultra Vires.**—An individual or a firm may make any contract not forbidden by law. A corporation may make only such contracts as come under its express or implied powers. All other contracts are beyond its powers, or, in legal parlance, ultra vires.

In the following discussion, we are considering corporate contracts as ultra vires only from the standpoint of lack of corporate power. Corporate contracts that are ultra vires because they are illegal or contrary to public policy obviously are unenforceable and require no discussion. As to the effect of an ultra vires contract, we have the following situations to consider:

1. Contract wholly executory. Neither party can enforce it. The corporation in refusing performance does not inflict any serious hardship upon the other contracting party, because he has not done anything. As the rule should work both ways, the other party likewise may rescind.

2. Contract fully executed by both parties. The courts will not interfere on behalf of either party to restore the status quo and will leave matters as they are.

3. Contract fully executed by one party. Here we apply the strict or the liberal rule depending upon the jurisdiction.

a. According to the strict rule which is followed in the federal courts and in some states, the contract is not enforceable. However, the performing party (the corporation or the other contracting party, as the case may be) may disregard the express contract and hold the other party in quasi-contract for any benefit received.

b. The liberal rule is followed in most of the states, including New York, Illinois, Michigan. It is based on the principle of estoppel. The chief test will be the element of reliance. If the other party reasonably relied upon the corporation's having

power to make the contract, he will, according to this principle, be entitled to have it enforced. If the contract is beyond the apparent scope of the corporate business, as a speculative contract by a bank, the estoppel principle will not hold.

Hotchkiss *v.* Third National Bank of Syracuse, 219 Mass. 234

P sued D for damages for failure to carry out a contract to deliver 100 shares of stock of a corporation. D defended on the ground that the contract was ultra vires for a national bank. It appeared that D did not own the stock but was acting for an unnamed depositor.

Held: For D. A national bank may sell stock held as collateral for a loan upon default of the debtor; but it may not buy or sell stocks as a source of revenue or profit, as this does not come within its statutory powers.

Review Questions

1. Where do we find the powers of a corporation?
2. What is the difference between the general and the specific powers of a corporation?
3. What are the general powers of a corporation?
4. When a corporation is sued, upon whom are the papers served?
5. What are the powers of a corporation in regard to buying, selling, and holding property?
6. By whom are the directors elected?
7. By whom are the other officers of the corporation elected?
8. Under what conditions may a corporation (1) buy back its own stock, (2) buy the stock of other corporations?
9. What are ultra vires acts?
10. Explain the attitude of the courts towards ultra vires contracts (1) that are wholly executory and (2) those that have been fully executed by both sides.
11. Explain the strict and the liberal rules with regard to ultra vires contracts.
12. Would a corporation organized to carry on a railroad business be authorized to operate steamboats?
13. Would a railroad corporation have implied power to operate telegraph lines if the charter did not give it this specific power?
14. A corporation is organized to conduct a chain of grocery stores but the charter does not give it any power to lease stores. Would it have the implied power to make leases for stores?

CHAPTER XXXVI

STOCK

§ 318. **Capital Stock.**—The capitalization or capital stock of a corporation is the amount of stock as fixed by its charter which the corporation is empowered to issue. This amount can be changed only by amendment of the charter. This capital stock is regarded as divided into equal shares, termed "shares of stock." When by purchase or otherwise a person acquires an interest in the capital stock, he becomes a stockholder in the corporation, and his interest is expressed in these shares of stock.

The par or face value of shares of stock is fixed by the charter of the particular corporation, and, unless expressly limited by statute, may be placed at any amount desired by the incorporators. This par value can be changed only by charter amendment. One hundred dollars is the most common par value of shares. The number of shares owned by any individual gives an accurate measure of his interest in the corporation. For instance, if a man owns ten shares of the par value of $100 each in a corporation with a capitalization of $10,000, all of which is issued, he owns a total stock interest of one-tenth of the entire outstanding capital stock, and therefore has an undivided one-tenth interest in the entire corporate property and business.

The par value and the actual value of a share of stock may be very different. A $100 share of stock in a prosperous corporation will frequently be worth several times that amount, while in an unsuccessful corporation it may be worth little or nothing. In either case the par value remains the same.

§ 319. **Stock Certificates.**—Stock certificates are issued as a convenient evidence of the stockholders' interests in a corporation, and every stockholder whose stock is paid for has a right to such a certificate. These certificates state the number of shares owned, their par value, and usually any other material facts affecting the stock in question, as, for instance, if such be the fact, that it is full-paid, or that it is preferred stock. These certificates of stock are signed by the president and secretary, or president and treasurer of the corporation and are sealed with the corporate seal. When properly issued, they are conclusive evidence of the ownership of the stock represented by them.

The stock certificate, as already stated, is merely the evidence of ownership of stock and is not the stock itself. The stock of a corporation usually exists before stock certificates are issued at all, and may be bought and sold by proper entries on the corporate books.

Each share of stock usually entitles the owner of record to one vote in all proceedings of the stockholders, whether assembled in annual or special meeting. In most states, the voting power of stock may be restricted, by proper charter provision, or stock may be issued without the voting power. Preferred stock is very frequently so issued. Unless expressly denied or restricted by proper provision, all stock has the usual voting power and this right may be exercised by the owner of record in person, or, usually, by proxy.

§ 320. **Capital Stock Versus Capital.**—The capital stock or capitalization of a corporation should be very clearly distinguished from its capital.

The capital stock is the total amount of stock the corporation is authorized by its charter to issue.

The capital, on the other hand, is the actual amount of property owned by the corporation, that is, its assets. It is obvious that the value of these assets is liable to change with

the fluctuations of the business or from other causes. The capital stock of the corporation and its capital, therefore, even though equal at first, may and frequently do differ greatly in amount. For instance, the capital stock of the Southern Pacific Co. is $372,000,000 while its capital is $963,000,000.

§ 321. **Unissued and Issued Stock.**—Unissued stock is not an asset of the company but is merely an unexercised right to issue stock when and as subscriptions for it can be obtained.

It usually represents excess capitalization. For instance, a corporation, organized to take over property worth $20,000 might perhaps be capitalized at $25,000 with the idea of selling the excess stock at some future time to raise working capital.

Issued and outstanding stock is stock which has been issued for cash, property, labor, services, or other values, or which has been subscribed for and the subscriptions accepted by the company. Such stock is issued stock and the subscribers or purchasers are stockholders of the company, even though the actual certificates by which this stock is represented may not have been issued.

§ 322. **Full-Paid Stock.**—In most of the states payment for stock may be made in anything of value. If the corporation has received the full face value for issued stock in cash or in any other form of payment permitted by law, such stock is termed "full-paid," and its certificates should be marked "Full-Paid" to indicate this fact. After stock has once been issued for full value, it may be sold at less than par without involving the purchaser in any liability for the difference.

If the corporation has not received the full face value for issued stock, the stock is but partly paid, and the purchaser of such stock may usually be held liable for the amount necessary to render it full-paid. This liability may be enforced either by the corporation, or, in event of its insolvency, by any creditor of the corporation.

Watered stock is stock for which the corporation has not received full payment in cash, services, or property. Watered stock is usually created by the issuance of stock in payment for property or services which have been overvalued; sometimes also it is created by the issue of stock insufficiently supported by the corporate property, as for instance, in cases of unwarranted stock dividends.

§ 323. **No Par Value Stock.**—In most states stock may be issued having no par value. Its value is the market rate. Such stock is full-paid when it is sold at whatever can be obtained for it in the market, and there is no further liability.

§ 324. **Common Stock.**—Common stock is the general or ordinary stock of a corporation, with neither special privileges nor restrictions. If any portion of the stock is given special privileges or restrictions, that portion is thereby removed from the class of common stock and the remainder constitutes common stock.

A form of stock certificate of common stock of no par value appears on page 253.

§ 325. **Preferred Stock.**—Preferred stock, as the term is usually employed, is that which has some preference as to dividends or assets over other stock of the same corporation. This preference is usually secured to it by special provisions in the certificate of incorporation, though in some states this may be attained by by-law provision.

Preferred stock may be either cumulative or non-cumulative as to dividends. Non-cumulative preferred stock must receive its preferred dividend for the current year before any dividend is paid the common stock, but if in any year its dividend fails or is only partly paid, it loses the unpaid amount. If the dividends on cumulative preferred stock are not paid in any year, or years, or are but partially paid, the amounts

INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE
No.
250 Shares
American Quito Finance Corporation
The corporation is authorized to issue 400 Shares of no par or nominal value, all of which shall be COMMON STOCK.
HENRY J. THOMPSON is the owner of
TWO HUNDRED AND FIFTY Shares of the Capital Stock of
American Quito Finance Corporation FULL PAID AND NON-ASSESSABLE
transferable only on the books of this Corporation in person or by Attorney upon surrender of this Certificate properly endorsed.
IN WITNESS WHEREOF, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this 24th day of February, A.D. 1926.
SHARES
PAGE

unpaid go over, or cumulate, and must be satisfied before the common stock receives anything. They remain a charge against the profits of the company until paid in full.

It is usually provided that preferred dividends shall be paid in full before the common stock receives any dividend. Unless otherwise expressly provided, after the preferred dividends are paid in any year, the common stock receives an equal dividend if the profits are sufficient, and both kinds of stock then share alike in any further dividends declared in that year. It is sometimes provided that, after the preference dividends are paid, the preferred stock shall share equally in all further profits with the common stock. Preferred stock is sometimes limited to its preferred dividend and does not participate at all in any further dividends.

It is often provided that in case of dissolution preferred stock shall be satisfied out of any assets of the company before the common stock receives anything. If this provision is not made, either by statute or by charter, the preferred stock in any liquidation of the corporation will first receive any dividends then due, but thereafter will fare the same as common stock.

Preferred dividends may be paid only from profits. If there are no profits, or if the profits are needed for purposes of the business, the dividend to preferred stock is either not paid at all, or, if the stock is cumulative, is passed over until profits are made. Unlike a bond, it is not a debt or liability of the corporation. Its owners are stockholders and not creditors, and failure of dividends ordinarily gives no cause of action against the company or its directors.

On page 255 is a form of certificate of preferred stock. Its similarity to the common stock certificate will be noted.

§ 326. **Treasury Stock.**—Treasury stock, in the better use of the term, is stock which has been issued for value and has

INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE

No. 25 — 300 Shares

Champion Container Company, Inc.

Preferred Stock $25,000

Common Stock 300 Shares No Nominal or Par Value

This is to Certify that ROBERT J. WILSON

is entitled to THREE HUNDRED

fully paid, non-assessable shares of the par value of $100 each of the PREFERRED Stock of CHAMPION CONTAINER COMPANY, INC. transferable only on the books of the Corporation in person or by attorney upon the surrender of this certificate.

The holders of the Preferred Stock shall be entitled to cumulative dividends thereon at the rate of 10% per annum before any dividends shall be paid upon the Common Stock.

The holders of the Preferred Stock shall not be entitled to vote at any meeting of the stockholders, and the entire voting power shall lie in the Common Stock. The Preferred Stock at the discretion of the Company shall be subject to redemption at par on January 2, 1923, or any day thereafter.

IN WITNESS WHEREOF, the said corporation has caused this certificate to be signed by its duly authorized officers and its corporate seal to be affixed thereto this 24th day of February, A. D. 1926.

Howard T. North
~~Secretary~~ Treasurer

Charles S. Wilson
President ~~Vice-President~~

by gift or purchase come back into the possession of the company. It differs from unissued stock in the fact that it may be sold below par without involving the purchaser in any liability for the unpaid balance. So long as the treasury stock is held by the company, it can neither vote nor draw dividends.

§ 327. Transfer of Stock.—The stock certificate usually has a blank form of transfer printed on the back. If this is signed, the stock may be transferred to anyone, and he will have a right to obtain a certificate made out to himself by surrendering the indorsed certificate to the corporation. If the name of the person to whom it is transferred is inserted, only that person has a right to the stock and to the new certificate.

As between the transferor and transferee, the certificate may be validly transferred by mere delivery of the certificate, but the corporation invariably requires a written assignment.

Where stock is pledged, it is sometimes desirable to have the assignment on a separate sheet of paper instead of on the back of the certificate. Then when the pledge is redeemed the certificate is returned in its original condition.

In the following form of transfer of a stock certificate specifies the transferee:

For Value Received, I hereby sell and transfer unto *Martin T. Marshall, of New York City, Twenty-five* Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint *Chester A. Slater* my Attorney to transfer the said stock on the books of the within-named Company, with full power of substitution in the premises.

ELLIS K. DOYLE

Dated, *October 1, 1925.*
In the presence of:
CHARLES T. ESTABROOK

Rice *v.* Rockefeller et al., 134 N. Y. 174

This was an action to require D to transfer to P on their books six shares of stock in Standard Oil Trust on surrender of certificates held by him. P had purchased the stock in the open market. A request for its transfer was refused. D proved that P was a competitor and rival of parties to the trust agreement and had a hostile intent in demanding the transfer.

Held: For P. As the certificate was transferable, D had to make the transfer on the books. The motive of P was not a subject of consideration unless it was shown that the transfer would harm the legal rights of the party making the transfer.

Certificates of stock in such a trust, having certain attributes of a corporation, are transferable as certificates of stock in a corporation.

When no discretionary right is expressly reserved, a corporation whose stock is on sale in the open market has no right to discriminate between its bona fide purchasers so as to deny to some the right to make their stock title effectual.

§ 328. **Stock Subscriptions.**—A subscription to take stock in a corporation becomes effective and binding upon its acceptance by the proper officials of the corporations, and even without the sending of a notice of such acceptance to the subscriber. The theory is that the subscriber offers to take the stock if his offer is accepted and knowing that such offers customarily are accepted (because his subscription would not be solicited if the corporation were not in the market to sell), he does not expect any notification of acceptance.

Where subscriptions are obtained for a proposed corporation, such subscriptions cannot be accepted until the corporation is organized. Hence subscribers may withdraw their subscriptions prior to the organization of the corporation.

A subscriber who can show that he was induced to subscribe because of misrepresentations may rescind his subscription and reclaim any moneys paid in to the corporation.

§ 329. **Stock Dividend.**—Dividends are usually distributed in cash; but they may be distributed in the form of additional stock.

The question whether such a stock dividend accruing on stock held by an estate should go to the life-tenant or to the remainderman, i.e., the person who has the ultimate interest after the death of the life-tenant is one on which the courts are not agreed. The general rule, however, is that the circumstances should be inquired into and if it is found that the stock

dividend was paid out of profits earned since the decedent's death, it belongs to the life-tenant. On the other hand, if it is found that the stock dividend was paid out of capital or from profits earned before the decedent's death, it belongs to the remainderman.

Review Questions

1. Define "capital stock."
2. What is the difference between the par value and the actual value of stock?
3. Can stock be issued and transferred except in the form of stock certificates?
4. What information is usually contained on a stock certificate?
5. By whom is the stock certificate issued?
6. What is the difference between capital stock and capital?
7. For what may stock be issued?
8. Is it legal to issue promoter's stock?
9. What is watered stock?
10. Define "common stock."
11. What is the difference between preferred stock which is cumulative and that which is non-cumulative?
12. Which constitutes the safer investment, preferred stock or common stock?
13. Why is common stock sometimes more valuable than preferred stock?
14. What is treasury stock?
15. How is stock transferred?
16. When does a stock subscription take effect?
17. When may it be rescinded?
18. Discuss the distribution of a stock dividend as between life-tenant and remainderman.

CHAPTER XXXVII

STOCKHOLDERS AND THEIR MEETINGS

§ 330. What Constitutes a Stockholder.—The stockholders of a corporation are those who actually hold its stock, or who have subscribed for its stock and have had their subscriptions duly accepted by the corporation. A stockholder of record is one whose ownership of stock is duly recorded upon the books of the corporation.

When outstanding stock is purchased, the transfer must be entered on the books of the company before the purchaser becomes a stockholder of record, entitled to vote, to share in dividends, and to receive a certificate of stock in his own name. Until that time he is the equitable owner of the stock, but is not known or recognized in any way as a stockholder.

Wheeler *v.* Millar, 90 N. Y. 353

D, the holder of stock of $5,000 par value issued to him by a corporation and for which he had paid nothing, was sued by a creditor of the corporation. D contended: (1) that he was not a stockholder; (2) the corporation owed him more than $5,000, but the proof showed only $2,000.

Held: (1) D is a stockholder, as the law recognizes stockholders of unpaid stock and makes them liable for non-payment; and (2) this is a good defense; but only up to $2,000, the amount proved by D.

§ 331. Rights of Stockholders.—The individual stockholder has but little part in the active management of the corporation.

The rights of stockholders may be stated as follows:

1. To be notified of and to participate in all stockholders' meetings, in person or by proxy, and to cast one vote for each share of stock held. This does not apply in the case of holders of preferred stock who do not have any voting rights.

2. To share, in proportion to the amount of stock owned, in all dividends declared on the class of stock held.
3. In the event of the dissolution of the corporation, to share in like proportion in any assets remaining after all the corporate debts and obligations have been paid. Where there is preferred stock, it is usually provided that the preferred stock will have priority but only up to the amount of its par value, and that the entire assets remaining will go to the common stock.
4. To subscribe to new stock, in proportion to the amount of stock held. Although the stockholder has an option to buy ahead of the public, he is not entitled to any reduction but must pay the price fixed by the directors and this may be in excess of the par value.
5. To inspect the corporate books and records.

This last right has been restricted by statute so that it amounts to little more than the right to inspect the list of holders of stock as shown by the stock ledger and the right to a financial statement. As to the latter the statutes usually provide that the treasurer, or other financial officer must at the written request of a certain percentage of the stockholders submit a financial statement but that only one such statement shall be required in any one year.

Shea v. Parker, 234 Mass. 592

P, a stock broker, being refused permission to examine the stock book of a corporation of which he held a single share of stock asked for a mandamus requiring the production of the stock book. P's purpose was admittedly to help him in his business as a stock broker. The statute stated that every stockholder was entitled to inspect the stock book.

Held: For P. The law is mandatory and makes no reservations. Therefore the purpose of the stockholder in making the inspection is entirely immaterial.

§ 332. **Powers of Stockholders.**—The powers of the stockholders may be summarized as follows:

1. Adoption or amendment of by-laws.
2. Election of directors.
3. Amendment of the charter.
4. Dissolution of the company.
5. Sale of the entire assets of the company.
6. The exercise of any specially conferred charter powers.

The board of directors is the sole managing and controlling authority of the corporation. The stockholders make the by-laws by which the directors are controlled, and elect the directors by whom the corporate affairs are conducted, but beyond this they do not interfere in any way with the transaction of the corporate business or the management of the corporate property. All this rests with the board. The stockholders have no right to interfere with directors who are acting in good faith, unless they are guilty of such serious mismanagement as to jeopardize the capital of the company.

Ordinarily the stockholders have no right to force dividends, even though there be a large surplus. This is a matter in the discretion of the directors. (§346.)

If the stockholders are not satisfied with the management of the directors, they must, except in the flagrant cases where equitable relief would be granted, wait until the annual meeting and then elect a new board that will carry out their wishes. Nor can the stockholders act directly for the corporation. A contract signed by every stockholder would not be the contract of the corporation and would not bind the corporation, unless also signed by its proper officers or otherwise formally accepted by its directors.

Leslie *v.* Lorillard, 110 N. Y. 519

The Old Dominion S. S. Co. bought off the opposition of the Lorillard S. S. Co. by a contract calling for monthly payments. The contract was entirely free from fraud or collusion, and did not restrain

competition as it related to one company only. P, stockholder in the Old Dominion Co., brought an action to recover the back payments and to restrain further payments.

Held: For D. Courts will interfere on application of stockholders, only to restrain illegal acts or acts fraudulent or destructive of the rights of the stockholders. The powers of the corporate management are largely discretionary.

§ 333. **Liabilities of Stockholders.**—A stockholder is liable to the company or to its creditors for any instalments remaining unpaid upon stock subscribed for by him. He may also be liable to creditors on any stock held by him which is not full-paid. Should dividends be paid from capital instead of from profits, stockholders are liable to corporate creditors for any amount so received by them.

Also stockholders of national banks and of most state banks and trust companies are held liable, in case of the insolvency of their institutions, for an amount equal to their original subscriptions.

As a rule, however, in the ordinary business corporation the holder of full-paid stock is in no danger of losing anything more through corporate failure or involvement than the amount he has actually invested in his stock.

§ 334. **Stockholders' Meetings.**—The annual meeting is usually the only regular meeting of stockholders. At this meeting the directors for the ensuing year are elected, the reports of the officers are presented, any amendments to the by-laws may be submitted and acted upon, and any affairs of the company requiring the action or attention of the stockholders may be presented for consideration. If any sweeping change in the business or policy of the company is desirable, it is usually authorized by action of the stockholders at this meeting.

If action by the stockholders is necessary in the interim between the annual meetings, a special meeting may be called.

Although notice of the annual meeting could legally be dis-

pensed with, the by-laws usually require the giving of notice.

Notice of a special meeting is always required and the notice should state the subject matter that will be taken up at the meeting.

It is usually required that stockholders' meetings be held in the state where the corporation was organized. Some states, including of course those that cater to corporations, provide that the meetings may be held outside the state.

§ 335. **Voting.**—The general rule is that each stockholder of record is entitled to one vote for each share of stock held in his name. That is, if five directors are to be elected the holder of one share may cast one vote for each of these. The holder of five shares may cast five for each and so on. Under the cumulative system of voting, which is designed to secure for the minority a representation on the board, the holder of one share also has one vote for each director to be elected, but he may cast all five votes—if five directors are to be elected—for any one candidate or may distribute them among the five as he sees fit.

In many corporations the preferred stock is restricted as to voting power, except on certain subjects which are vital to the preferred shareholders.

Only stockholders whose shares are registered on the corporate books are entitled to vote.

§ 336. **Voting Trusts.**—The voting trust is a method of combining stock in the hands of one or more trustees for the purpose of controlling the corporate affairs during a certain period of time. This device is resorted to in order to eliminate friction or disputes among stockholders and to protect the minority.

The voting trust in most states must be limited as to duration. It must of course be for a purpose that is not illegal or against public policy.

§ 337. **Proxies.**—Any stockholder entitled to vote at a stockholders' meeting may usually give a proxy (a power of attorney) empowering some other party to attend stockholders' meetings as his representative and vote upon his stock in his stead.

The usual form of proxy is shown in the following form:

KNOW ALL MEN BY THESE PRESENTS, THAT I, Arthur T. Peterson, do hereby constitute and appoint Allen Forest as my Attorney and Agent for me and in my name, place and stead, to vote as my proxy at any election of Directors of the Riverview Realty Co., Inc., according to the number of votes I should be entitled to vote if then personally present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this fourth day of December, one thousand nine hundred and twenty-five.

ARTHUR T. PETERSON [L.S.]

Sealed and delivered in the presence of
JOHN GROGAN

STATE OF NEW YORK
CITY OF NEW YORK } *ss.:*
COUNTY OF NEW YORK

On the fourth day of December, in the year one thousand nine hundred and twenty-five, before me personally came Arthur T. Peterson, to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and he acknowledged that he executed the same.

(Signed) HOWARD F. SMITH,
Notary Public

Review Questions

1. Who are stockholders?
2. After purchasing stock of a corporation, what is necessary before one will be entitled to vote at a stockholders' meeting?
3. Enumerate the rights of stockholders.
4. What limitations are there on the right of a stockholder to subscribe for new stock?
5. What are the usual limitations on the stockholder's right to inspect the corporate books and records?
6. Can a corporation properly refuse to exhibit its books to a stockholder because doing so would be extremely inconvenient to the management of the corporation?
7. What is the liability of stockholders to creditors?
8. What power has the majority of the stockholders?
9. As a rule, how often do stockholders meet?

10. What is done at the annual meeting of the stockholders?
11. What is cumulative voting?
12. What are voting trusts?
13. What is a proxy?

CHAPTER XXXVIII

ADMINISTRATION AND TERMINATION

§ 338. **Accepting Contracts of Promoters.**—One of the first subjects usually taken up on the organization of the corporation is the contracts made by the promoters before the creation of the corporation. The corporation is not liable on such contracts because it could not authorize them as it was not in existence.

Usually such contracts are accepted by the corporation. Strictly speaking it cannot ratify (§194), but it can adopt the contracts. Adoption, in legal effect, is the making of a new contract as of the date of adoption.

The adoption generally is by a resolution of the stockholders or the directors or both, but it may be implied by the corporation's accepting benefits under the contract.

Cushion Heel Shoe Co. *v.* Hartt, 181 Ind. 167; 103 N. E. 1063

Hartt obtained subscriptions to the stock of the Cushion Heel Shoe Co. prior to its incorporation. Subsequently one of the directors said he should be compensated, but the board never took any action on his claim.

Held: For the corporation. The rule is that a corporation will be held liable for services rendered by its promoters before incorporation only when it expressly recognizes or affirms such claims after it becomes a legal entity. The mere statement of a director is not a ratification by the corporation.

§ 339. **Liabilities of Promoters.**—To protect themselves, the promoters should have the corporation assume the contracts they have made. By doing so, the corporation agrees to answer for the liabilities of the promoter. But this may not be agreeable to third parties, who, though willing to enter into a contract relation with the corporation by the adoption process

will not release the promoters. By taking this attitude of "the more the merrier," third parties have additional protection.

Inasmuch as the adopted contract is legally a new contract, it does not eliminate the promoters' contract unless the parties so intend. It is generally held that if the contract was made in the name of the proposed corporation and on its credit and for its benefit, that adoption will release the promoters. But as a precaution, the contract should state that its adoption by the corporation when organized shall relieve the promoters from all responsibility and, in the absence of such a provision, the third parties should be required to agree to this upon the corporation's acceptance of the contract.

The relationship between the promoters and the corporation is a fiduciary one and the promoters are held to a high degree of good faith. They may be compelled to disgorge any secret or inordinate profits. A promoter who sells to the corporation property that he owned before the corporation was planned is entitled to a reasonable profit; but if he acquired the property after the corporation had been projected, he is not entitled to any profit.

§ 340. **Status and Functions of Directors.**—The board of directors, elected by the stockholders, has the entire management of the corporate affairs.

The directors of a corporation are held to be its agents, and, in a measure, trustees for the stockholders. They are responsible for its proper management.

§ 341. **Number and Authority.**—In most of the states there must be at least three directors. The maximum number is not usually designated. For all ordinary corporations a small board is most convenient, and as a rule most effective.

When the board is unwieldy or difficult to assemble, the actual administration of the corporate affairs is usually delegated to an executive committee composed of from three to five members of the board.

The board elects the corporate officers, appoints such other agents as may be necessary, and has entire charge of the property, interests, business, and transactions of the company. The board of directors is the embodied corporate authority.

§ 342. **Liabilities.**—Directors are liable in the same manner as trustees for any wrong-doing; also for any neglect that results in loss to the corporation. For instance, they are liable if they issue as full-paid stock which is not full-paid, or pay dividends out of the capital of the company when there are no profits, or otherwise abuse their power.

§ 343. **Qualifications.**—Most of the states require that directors shall be stockholders of the company; also, usually, that one member of the board shall be a resident of the state of incorporation. In some of the states the stockholding requirement may be waived by proper provision in the charter or by-laws.

§ 344. **Meetings.**—The times and places for regular meetings of the directors are fixed by the by-laws. Monthly meetings are generally prescribed. In a small company one regular meeting a year may suffice. Should action of the board prove necessary in the interim, special meetings may be readily called, or be held by consent whenever the occasion arises.

A careful record of all action taken at the meetings should be kept in the corporate minutes.

§ 345. **Resignations and Removals of Directors.**—A director may resign at any time and without advance notice.

A director can always be removed for good cause and if the by-laws so provide he may be removed by a vote of the stockholders or the directors without cause.

It is usually provided that vacancies occurring by death, disability, resignation or removal may be filled by the other directors, but in the absence of such a provision the appointment would have to come from the stockholders.

§ 346. **Dividends.**—The matter of declaring dividends, the time when they are to be declared, and the amount, rest in the discretion of the board of directors.

Dividends may be legally declared only from surplus or net profits. If paid from the capital or obtained in any way that will impair the capital of the company, the directors render themselves personally liable, and should the corporation become insolvent the amounts so paid may be recovered from the directors or the stockholders for the benefit of creditors.

Dividends are paid only to stockholders of record and must be equal as between holders of the same class of stock. Particular stockholders may not be favored either in time or amount of payment.

§ 347. **Election of Officers.**—The board can act only through the officers and agents which it appoints. Usually the election of officers is held at the first board meeting in each year after the election of the new directors. In this way the new directors may elect their own officers and thereby secure an official staff in harmony with their views and policy. The usual executive officers of a corporation are a president, vice-president, treasurer, and secretary. Two offices may be held by the same person if the duties are not incompatible.

The president and vice-president, as presiding officers of the board, should be chosen from its membership. Save as to these, the officers need not be selected from the board.

§ 348. **Duties of Officers.**—The president as the chief executive presides at meetings and has general charge of the business of the corporation. He must report to the board of directors and should get their instructions as to all matters of outstanding importance. He signs contracts and corporate documents.

The vice-president acts for the president in his absence. Many large companies have several vice-presidents, who are heads of different departments.

The treasurer has charge of the corporation's funds and securities. He supervises the making of payments and the keeping of the financial records and makes up all financial reports.

The secretary is the recorder and clerk. He keeps the minutes, the stock ledgers and records, supervises the issuance and the transfer of stock, and has custody of the corporate seal, with which he attests important corporate documents. He may also have charge of some branch of the company's regular work.

Hall *v.* Ochs Co., 34 App. Div. (N. Y.) 103

Ochs, as president of D Co., guaranteed the payment of certain rent; and on default in payment of the rent, D was sued on the guarantee. The directors did not authorize the guarantee but they knew of it.

Held: For P. The authority of the president may properly be implied from the recognition of his act by the directors.

§ 349. **Execution of Contracts.**—Corporate contracts must be authorized by resolution of the board of directors. In practice, however, this rule is somewhat relaxed. The officers customarily make contracts in minor matters incident to their official duties without express authorization. If the officers have been habitually permitted to contract for the corporation without specific authorization, such contracts, unless obviously in excess of the proper official powers, are binding on the corporation.

§ 350. **Annual Reports.**—Annual reports are usually sent to the stockholders.

In addition the corporation laws require the submission of annual reports to the state authorities. The requirements vary in the different states but in the main the information required is the following:

1. List of officers and directors.
2. Amount of stock authorized by classes.

3. Amount of stock issued by classes.
4. The business in which the corporation is engaged.
5. The amount of indebtedness, including bonded indebtedness.
6. The value of the real and of the personal property owned by the corporation.
7. The location of the corporation's principal office.

Corporate officers and directors may be held responsible for failure to file the required reports.

§ 351. Taxation.—Corporate taxation is an important question. It is somewhat complicated and unless great care is used an undue proportion of the corporate revenue may go into governmental coffers.

In addition to the organization tax, the taxes to which the successful corporation will be subjected are the following:

1. Federal income tax of 13% on profits after deduction of $2,000 where the annual income is less than $25,000.
2. State franchise tax. This is exacted for the privilege of doing business. It may be based on the amount of stock issued, the amount of capital used in the state or upon the income earned in the state. A foreign corporation may be assessed for a franchise tax, but the tax cannot be based upon the stock issued: it must be restricted to the capital used or the income secured in the state.
3. Realty and personalty taxes. Both domestic and foreign corporations are subject to the ordinary local taxes on the owners of real and personal property.

§ 352. Termination of Corporate Existence.—The corporate existence may be terminated in any of the following ways:

1. By expiration of the period fixed in the charter.

2. By repeal of the charter, if the legislature reserved this right.
3. By a voluntary dissolution.
4. By an involuntary dissolution.
5. By annulment of the charter.

The first named method rarely occurs. In most states the law permits perpetual existence and in the few states requiring a fixed duration, renewals are obtainable.

The second method likewise is used only infrequently, because the legislatures properly feel that all cases of charter cancellation should be handled by the attorney-general and the courts under other provisions of law. However, in some states the legislature has conferred authority on the executive department to repeal charters for non-payment of corporate taxes.

§ 353. **Voluntary Dissolution.**—If the corporation's business has been wound up or becomes steadily unprofitable, there should be a voluntary dissolution.

This requires the consent of a large proportion, usually two-thirds of the stockholders, the giving of notice to creditors, and the advertising of the proceedings. Where all the stockholders give their written consent, the dissolution, in most states, will not require judicial proceedings. But judicial proceedings must be had if there are any dissenting stockholders and generally they are advisable, except in very small corporations, because the directors and officers can then secure a court order exempting them from any further liability.

Bowditch *v.* Jackson, 76 N. H. 351; 82 Atl. 1014

The question in the case was whether a business corporation could be dissolved and closed out by the majority of the stockholders and against the protest of the minority.

Held: Where the majority obtain some undue advantage from the sale, it will not be valid. But where there is no fraud and the majority in interest believe that the corporate affairs should be wound up, their decision will prevail, despite the protest of the minority.

§ 354. **Involuntary Dissolution or Annulment.**—The corporation laws usually provide that the corporate charter may be annulled for non-user or for mis-user. Non-user, as the term implies, means failure to carry on business under the charter. Mis-user relates to the unlawful conduct of the business.

Proceedings to annul the charter must be brought by the attorney-general.

In some states proceedings to dissolve the corporation may be brought on the ground of the corporation's insolvency. Annulment and involuntary dissolution, though technically different, in practical effect are the same.

Involuntary dissolution proceedings may, in most states, be brought by any creditor if the attorney-general, after notice, fails to act.

§ 355. **Receiverships.**—Where annulment or involuntary dissolution proceedings are pending, the court will generally appoint a receiver to administer the corporate affairs.

Receivers are also appointed in corporation bankruptcies.

In addition to these cases, a receiver may be appointed on a proper showing (1) that the corporation's funds are being wasted or misappropriated by the officers or directors, or (2) that the corporation, although technically solvent, lacks sufficient available cash to pay its creditors. In these cases the object is to straighten out the situation and get the corporation back on its feet.

Review Questions

1. Under what conditions does a corporation become liable upon contracts made by promoters?
2. How should promoters protect themselves?
3. What body usually has the management of a corporation?
4. Whom do the directors represent?
5. Are they held to a very high degree of good faith? Why?
6. What are the general powers of the directors?

7. Has a director any power to act for a corporation except while participating at a director's meeting?
8. In what cases would a director be personally liable to stockholders?
9. Does a director have to be a stockholder?
10. Does an order coming from the board of directors have any control over the officers of the corporation? Explain.
11. What power has the board of directors in regard to dividends?
12. In the ordinary case is it necessary that a corporate contract be specifically authorized by a resolution from the board of directors? In most cases who makes contracts for the corporation?
13. What are the usual types of corporate reports required by the authorities?
14. What are the chief methods of corporate taxation?
15. Enumerate the different ways in which the corporate existence may be terminated.
16. What are the requirements for (1) voluntary dissolution, and (2) involuntary dissolution?
17. Discuss corporate receiverships.

Negotiable Instruments

CHAPTER XXXIX

FORM AND INTERPRETATION

§ 356. Purpose and History.—Negotiable instruments are instruments of credit that serve as substitutes for money.

Their origin is not altogether certain. Some authorities say that they were invented by the Greeks. In any event, the bill of exchange is definitely known to have been used by the Chinese, and by Florentine and Venetian merchants in the thirteenth century and it was resorted to by the Jews when they were banished from England in 1290.

Promissory notes were used by the Romans, but they did not have the quality of negotiability. They came into use in England in the seventeenth century, but had been used earlier on the continent. Checks were of even later origin.

§ 357. Quality of Negotiability.—Negotiable instruments, although subject to most of the general principles of the law of contracts, are exempt from some of its restrictions. Negotiable instruments have certain special characteristics that are embodied in the quality of negotiability.

The quality of negotiability lies in the fact that any person, not an original party, who takes a negotiable instrument in the ordinary course of business, may collect on it without proving how he obtained it and without being subject to certain defenses applicable to ordinary contracts.

This will more readily be understood if we keep in mind the thought that a negotiable instrument is a commercial convenience to take the place of money. Consequently a bank check for example, in the hands of a "holder in due course" is

given the same legal attributes as a treasury note. Of course there is a practical difference in the credit of the maker. The treasury note, issued and backed by the government, is universally accepted unless the currency has depreciated; whereas a check may be refused because the maker's credit may be unknown or unsatisfactory.

§ 358. Characteristics of Negotiable Instruments.—The chief differences between an ordinary contract and a negotiable instrument are these:

1. Method of Transfer.—A contract is transferred by assignment. A negotiable instrument is transferred by endorsement or in some cases by delivery.

2. Right to Transfer.—Some contracts are not assignable, whereas all negotiable instruments may be transferred.

3. Title and Equities.—The assignee of a contract merely steps into the shoes of the person who assigned it, and if there has been any reason, as between the parties, why it should not be paid, this can be set up against the assignee if he brings suit, exactly as if he were the original party. If this were true of a promissory note, no one would dare discount it, except after a very careful investigation, because any reason for non-payment that might exist between the original parties could be used to destroy the whole value of the note.

For example if A had been induced by fraud, duress, or undue influence to sign a subscription contract to buy stock in the Optimistic Gold Mining Company and the contract had been assigned by the Mining Company to X, a third party who in good faith had paid value for it, A could set up the appropriate defense against the innocent third party. Here X gets no better title than the Mining Company and takes the contract subject to all equities and defenses. But if A had signed a promissory note instead of signing a contract, he would have no such defense against X. Here X gets a better title

than the Mining Company had to give and he is not subject to the ordinary defenses and equities. (See §410.)

4. Consideration.—An ordinary contract requires a consideration. A negotiable instrument does not as between remote parties, e.g., A gives B a written promise to pay him $100 and the writing, though not in the form of a promissory note, has all the appearance of a formal contract, the promise being stated to be for a valuable consideration. But in reality there was no consideration, the promise is not enforceable, not even in the hands of an assignee who took it in good faith and for value. On the other hand, if A put his promise in the form of a promissory note, the note, though not enforceable by B against whom the lack of consideration could be set up, would be collectible by a holder in due course.

These special rights are available only to the "holder, in due course." (See Chapter XLIII.)

§ 359. Uniform Negotiable Instruments Law.—Notes, checks and drafts are used so extensively that the laws governing their transfer are of great importance. When the subject of uniform laws was brought up, the law of negotiable instruments was the first to be prepared and the one most widely adopted. The Uniform Negotiable Instruments Law, which was codified in 1897 by the Commission on Uniformity of Law appointed by the American Bar Association, has been adopted by every state except Georgia.

In discussing this subject, the Uniform Negotiable Instruments Law has been followed as closely as possible and some extracts are given from the text of the law.

The following are the requirements for negotiable instruments laid down by the Uniform Law:

> Sec. 1. An instrument to be negotiable must conform to the following requirements:
>
> 1. It must be in writing and signed by the maker or drawer.

2. It must contain an unconditional promise or order to pay a sum certain in money.

3. It must be payable on demand, or at a fixed or determinable future time.

4. It must be payable to order or to bearer; and

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

The fifth requirement is only of minor importance in comparison with the others.

§ 360. Instrument Must be Written and Signed.—The negotiable instrument must, of course, be in writing. Ink is not necessary as writing by pencil, typewriting, printing, or even painting, would be sufficient. Although printed forms are almost universally used, a negotiable instrument may be made on wrapping paper, cardboard, cloth, or even on a piece of board. The writing must be complete. A negotiable instrument may not be partly written and partly oral.

The instrument must be signed. A rubber stamp signature would suffice, but in case of the non-payment of the instrument, it would be necessary to prove that the alleged maker had used or had authorized the use of the rubber stamp, and this might be difficult. The signature may be by initials or by an assumed name, but here again there might arise the difficulty of proof.

When it is signed by a corporation or by one partner on behalf of the other partners, the question may arise as to whether or not the party signing had authority to do so.

An agent who signs for a principal must be very careful to sign in such a way as not to give any idea of personal responsibility. The following signatures are held to be by the principal only: Samuel Smith, by his agent, John Jones; Samuel Smith, by John Jones; Samuel Smith, per John Jones.

The following are construed as the signatures of the agent only: John Jones, agent of Samuel Smith; Edward Norton, Secretary, or Edward Norton, Secretary of the Excelsior Com-

pany. The reference to the agency or the official capacity of the signer is held to be purely descriptive. This is fair, because a party who uses an ambiguous designation should suffer the consequences.

§ 361. **Payment of Fixed Sum in Money.**—An instrument by which the maker promises to deliver a certain quantity of corn, wheat, lumber or any other commodity at a certain time would not be negotiable because its value could not be definitely determined until the time of delivery, and a negotiable instrument, being a substitute for money, must have a fixed value. Consequently, if there is any uncertainty as to the amount to be paid, the instrument will not be negotiable. The certainty of the amount is not affected, however, by a provision that interest must be paid or that the principal is to be paid in certain installments or that the cost of collection or an attorney's fee is to be added in case payment is not made on maturity.

When the sum payable is stated in foreign money, the instrument is negotiable because it is treated as calling for the equivalent amount in our money. But if stated to be payable only in the foreign money, it is not payable in what is money under our laws and therefore is non-negotiable.

§ 362. **Promise to be Unconditional.**—The promise or order to pay must be absolutely unconditional and not contingent upon the happening of some event or the doing of some act. A written promise to pay a certain sum out of the proceeds of a certain claim or on the completion of a certain contract would be dependent upon a contingency and consequently would not be considered negotiable.

A bill containing an order "to pay $1,000 out of my special account" would be conditional because payment would be dependent upon there being $1,000 in the special account. If, however, the directions were "to pay $1,000 and charge the same to my special account" the order would be unconditional because the bill is payable in all events and the statement in re-

gard to charging the special account is simply naming a method of reimbursement, a private matter between the drawer and the drawee which has no effect at all upon the holder.

An order to pay out of "moneys due me on my building contract with the M & N Realty Corporation" would not be conditional upon there being sufficient money due to the drawer to cover the amount of the draft.

A reference in the instrument to the transaction involved ordinarily does not impair its negotiability. For example a so-called "mortgage note" will usually refer to the fact that the note is secured by a certain mortgage. This does not affect the promise to pay: it simply backs it up by security.

But in some states a reference to a conditional sale is held to make the instrument non-negotiable on the theory that the instrument on its face shows that the consideration (i.e., the title to the property) has not been received by the maker.

In a bill of exchange, extremely polite language will make the instrument non-negotiable. A statement that "I will be obliged if you will pay $1,000 to X or his order," is a request and not an order to pay.

Commercial Credit Co. *v.* McDonough, 238 Mass. 73

D gave a note as part payment of a motor truck sold under a guaranty. The seller indorsed the note to P (a concern that financed automobile dealers), which knew of the guaranty. Subsequently a defect in the truck was disclosed, a claim was made under the guaranty and payment of the note was refused.

Held: D liable. The guaranty did not make payment of the note conditional.

Merchants National Bank *v.* Santa Maria Sugar Co., 162 App. Div. (N. Y.) 248

The question was whether the following note was negotiable:

June 20, 1911

I shall pay to the order of the American Hoist and Derrick Co. on August 30, 1911, in the City of New York, the sum of $2,340, for amount of the second installment agreed on for a crane of their manufacture purchased on this date, according to specifications of their representative Mr. H. S. Johansen.

Santa Maria Sugar Company.

Held: The note is negotiable. The qualifying clause simply tells what the note is given for, but it does not make its payment conditional upon the crane's being in compliance with the specifications.

§ 363. **Certain Future Time.**—The law directs that the time of payment must be certain. The instrument must be payable as follows:

1. On demand, or
2. At a certain time after demand, or
3. On or before a certain fixed time, as three months from date, or at a fixed future time, or
4. On or after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain.

An instrument payable on death is payable at a determinable time. Where the instrument is payable upon the arrival of a ship, or upon the completion of a certain contract, or the arrival of a certain person at a certain age, the time is neither fixed nor determinable, as the event upon which payment is based is not certain to happen. Making payment "on or before" a certain date is valid, but not if payment may be in whole or in part on or before a certain date.

§ 364. **Number and Designation of Payees.**—Usually there is only one payee, but there may be two or in fact any number of payees. When there is more than one payee, all must indorse, unless they are partners or one has authority to act for all. But where the instrument is payable to A or B (e.g. William Davis or his attorney Patrick Burns), either one may indorse.

Sometimes the maker designates himself as payee. Then he must indorse. Likewise if a draft is made payable to the drawee, it will be ineffectual unless the drawee both accepts and indorses it.

The payees may be designated by official title, e.g., the

trustees of the Central Y. M. C. A., the overseers of Harvard University, the Comptroller of New York City, etc.

§ 365. **Payable to Order or to Bearer.**—To be negotiable, the instrument must be payable to order or to bearer. It may be made out "Payable to Bearer," "Payable to John Smith or Bearer," "Payable to John Smith or Order," or "Payable to the Order of John Smith." Some one of these phrases is necessary to indicate negotiability.

If payable "to bearer John T. Simpson," it is not negotiable, because it is payable to a particular bearer instead of being payable to any bearer.

There are two exceptions; one is where the instrument is made out to cash and the other is where it is made out to a person who the maker knows is fictitious or non-existent. This is the same as making it out to cash. In these cases, also, the instrument is negotiable.

§ 366. **Allowable Provisions.**—An instrument which contains an order or promise to do any act in addition to the paying of money is not negotiable. An example of this is a promise to pay a certain sum of money and to transfer certain securities at a certain time. The reason for this is that an instrument of this type has a fluctuating instead of a fixed value. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities or a confession of judgment in case the instrument be not paid on maturity, or

2. Gives the holder an election to require something to be done in lieu of a payment of money. It is to be noted that the option must be with the holder and not with the maker. If the promise to pay $500 or transfer to the holder the shares of stock of the Adams Express Company on a certain day, the instrument calls definitely for the payment of a certain sum but gives the holder the option of taking the money or the stock, or

3. Adds the costs of exchange, or collection, or

4. Waives any right, such as waiver of protest, presentment, or notice of dishonor.

Empire National Bank *v.* High Grade Oil Refining Co., 260 Pa. 255

D's note stated that he had deposited certain collateral security and that the holder had the right to call for additional security and upon failure to respond, the note would become due immediately.

Held: For P. The note is negotiable. It is "not the will of the holder that makes the note payable: it is the failure of the maker to respond with additional security and such a failure on the part of the maker is an event that will make the time of maturity definite.

§ 367. **Non-Essentials.**—The instrument need not be dated nor need it specify the place where it is drawn, nor the place where it is payable. Although the term "valued received" is often used, it is not necessary.

§ 368. **Supplying Omissions.**—The law provides that if the date is left blank, any holder may insert the true date. He may also fill in any other material particulars that have been left out. In filling in an omission, he must follow the agreement that he had with the maker. For example, in filling in the amount which had been left blank, he is restricted to the amount agreed upon. If he fraudulently inserts a greater amount, he personally will lose all his rights on the instrument because he has been guilty of a fraudulent alteration.

But an innocent third party to whom he negotiates the instrument for value will be able to enforce it for the amount filled in. The reason is that the third party has been misled by the negligence of the maker; consequently the maker should bear the loss.

Redlich *v.* Doll, 54 N. Y. 234

D made and delivered a note containing an unfilled blank for the place of payment. The first holder filled in the name of a bank as the place of payment and negotiated it to P, an innocent transferee for value.

Held: The note carried implied authority to fill up the blank and the maker is liable to any bona fide holder on the principle of estoppel.

§ 369. Delivery.—The negotiable instruments law provides that "every contract on a negotiable instrument is incomplete and irrevocable until delivery of the instrument for the purpose of giving effect thereto."

The reason for this is that the intention of the maker, acceptor or indorser to assume the obligation must be evidenced by the overt act of delivery. The mere act of signing is not sufficient; it must be followed up by delivery in order to create the obligation.

The application of the rule depends upon the parties involved, as we will see by considering instruments conditionally delivered and stolen instruments.

Where there is a conditional delivery, the delivery will not be effective as between immediate parties and remote parties who are not holders in due course, until and unless the condition is complied with. For example, Jones gives Brown his promissory note for $5,000 with an oral understanding that Brown is not to use the note unless he organizes a certain corporation. Unless the corporation were organized the note would not be any good to Brown or to any assignee. But the note would be enforceable by a holder in due course, because such a holder is entitled to the absolute presumption that the instrument had been duly delivered.

With respect to an instrument that was never delivered at all but was stolen, the only person having any right at all is the holder in due course; and his right is dependent upon whether or not the instrument was complete when stolen. If it was a completed instrument, he will be protected, but if it was incomplete at the time of the theft and was subsequently completed and put into circulation, the holder in due course would not have any title or interest in the paper. So it will be seen that

if a man signs a blank check which is subsequently stolen, filled in and passed for value to an innocent party, the maker of the check will not be liable. There would be an exception to this if the signed blank check had been left openly in a place where it could readily be stolen.

Linick *v.* Nutting, 140 App. Div. 265

P signed a blank check, which was stolen, filled in and indorsed to D, an innocent taker for value, who collected it from P's bank. P took up the check from his bank and sued D.

Held: For P. There was no delivery. Possession is prima facie evidence of delivery, but it may be shown that the instrument was never put into circulation. It was not negligence for P to sign a blank check, because one does not have to anticipate and guard against the possibility of a crime.

§ 370. **Consideration.**—All negotiable paper is presumed to have been given for a valuable consideration, and every holder is entitled to this presumption.

This presumption works a practical short cut in law suits on negotiable instruments. All that the plaintiff has to do is to testify that he is the holder of the instrument and to prove that the instrument was signed by the defendant. It is not necessary to prove delivery because this is also presumed.

This presumption of consideration is irrefutable in favor of a holder in due course. Hence such a holder is never concerned with the question of consideration.

Where the plaintiff is an immediate party, or a remote party who is not a holder in due course, the presumption may be refuted. The defendant may introduce testimony to show that he got no consideration for assuming the obligation. (See §410.)

The defendant cannot set up that the plaintiff gave no consideration, provided consideration had been given by one of the former holders. The reasons for this are that it should make no difference to the obligor whether the plaintiff got title by pur-

chase, by gift or by bare assignment and besides the holder is entitled to the rights of his predecessor.

Where the question of consideration comes up, the general principles of contracts apply. With regard to an antecedent consideration, the Uniform Law provides that "an antecedent or pre-existing debt constitutes value." This does not eliminate the inhibition against a mere past consideration (such as a gratuitous promise to pay for friendly acts), for it requires a "pre-existing debt"; but even an outlawed debt will suffice.

Anyone having a lien on a negotiable instrument is a holder for value up to the amount of his lien.

§ 371. **Rules of Construction.**—The Uniform Law provides the following rules to govern cases where the language is ambiguous:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount;
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;
3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;
4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;
6. Where a signature is so placed upon the instrument

that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Review Questions

1. How in general do negotiable instruments differ from contracts?
2. What is the quality of negotiability?
3. How do negotiable instruments and ordinary contracts differ as to the method and the right of transfer?
4. In what respect may the title to a negotiable instrument be superior to that of an ordinary contract?
5. To what extent has the negotiable instruments law been adopted?
6. Enumerate the requisites of negotiability.
7. How should an agent sign?
8. Is the following instrument negotiable? Give reasons.

   On January 10, 1926, I promise to deliver to Patrick O'Brien or his order 144 Gillette Safety Razors. Value Received.

   John Paige.
9. Would a note like the following be good? Give reasons for answer.

   $100 Newark, N. J., October 29, 1925.

   Sixty days after date I promise to pay Edward Holmes from purchase money received from sale of his household goods left with me, the sum of One Hundred Dollars.

   John W. Dewey.
10. What four ways of fixing the due date are allowed?
11. Would a note payable one year after the death of the maker be good? Explain.
12. Would a note payable thirty days after the maker became thirty years old be negotiable?
13. To the order of what different parties may a negotiable instrument be made payable?
14. What provision can be made on a note as to the sale of collateral securities? What do you understand by the sale of "collateral securities"?

15. Would a provision that gave the holder the option of payment in money or delivery of wheat at $2 a bushel, be legal?
16. What omissions may properly be supplied?
17. What is the effect of improperly supplying omissions, (1) as between the original parties, and (2) as against an innocent third party?
18. What is the final step in the issuance of a negotiable instrument?
19. If a note were stolen or issued without the authorization of the maker, would it be good?
20. Does a negotiable instrument require a consideration?
21. If there were no consideration and the note got into the hands of the holder for value, would it be good?
22. If the holder in due course for value brought suit on a note that had been issued without a consideration, would that keep him from getting judgment?
23. Discuss the matter of an antecedent consideration.
24. What is the rule when words and figures differ?
25. From what time does interest run when a negotiable instrument draws interest and the instrument is not dated?
26. Where there are printed or written parts of the instrument and they conflict, what prevails?

CHAPTER XL

TYPES OF NEGOTIABLE INSTRUMENTS

§ 372. **Promissory Note.**—A promissory note is a single, unconditional promise to pay a definite sum of money at a fixed or determinable future time, or on demand to a person named, his order or to bearer.

The following is the ordinary form of promissory note made by an individual:

$750 00/100 Chicago, Ill., November 4 1925

Sixty days after date I promise to pay

to the order of Kendrick & Ames

Seven Hundred and Fifty 00/100 Dollars

Payable at their office, 20 Market St., Newark, N. J.

Value received

No. 315 Due Jan. 3, 1926 Harold A. Wilson

There are two parties. The maker and the payee.

If the payee negotiates the note, he indorses it and becomes the first indorser. The party to whom he indorses is the indorsee.

Some notes are more elaborate. They may contain additional provisions, describing the transaction for which the note was given and referring to collateral given with the note and fixing the right to sell it if the note or any installment is not paid. Or the note may have a provision giving any holder the right to enter a judgment if the note is not paid. This form is called a judgment note. In some states, the courts do not recognize the self-executing judgment feature and treat the instrument as a plain note.

$1500 00/100 New York, *January 6, 1926*

Ninety days after date, for value received *I* hereby promise to pay to **THE COAL AND IRON NATIONAL BANK OF THE CITY OF NEW YORK,** or order, at said Bank, in the City of New York, N. Y.

Fifteen Hundred.....DOLLARS,

with interest at the rate of *6* per cent. per annum until paid, having deposited with said Bank, as collateral security for the payment of this note and also as collateral security for all other present or future demands of any and all kind of the holder hereof against the undersigned, whether created directly or acquired by assignment, whether absolute or contingent, whether due or not due, including any endorsement or guarantee made by

the following property, to wit:

$500 New Orleans Public Service bond (1st and ref 5s Ser A 1952)

$1000 Armour & Co. of Del. bond (5½s Ser A 1943)

and do hereby give the said **The Coal and Iron National Bank of the City of New York** a lien for all of said demands, upon all property left with the said Bank (all remittances and property to be deemed left with said Bank as soon as put in transit to it by mail or carrier), and upon any balance of deposit account with said Bank, hereby authorizing said Bank to at any time charge any and all of the said demands against the deposit account of the undersigned on the books of the said **The Coal and Iron National Bank of the City of New York,** if there be such an account, or the said **The Coal and Iron National Bank of the City of New York** may at any time apply any balance of deposit account of the undersigned on account of this note or any obligation, indebtedness or liability of the undersigned to the said **The Coal and Iron National Bank of the City of New York;** and hereby authorize (s) said Bank, upon or after the non-performance of this promise, or upon or after the non-payment of any of the demands aforesaid, or upon or after failure to furnish further security as hereinafter agreed to sell the whole or any part of said collateral security or substitutes therefor or additions thereto, at any Broker's Board or at public or private sale at the option of the said **The Coal and Iron National Bank of the City of New York** without notice of intention to sell, or of the time or place of sale, and without demand of payment of this note or of any of the said demands, and after deducting all expenses, including all for legal services arising from or incidental to the sale, realization or collection of any of said collateral security, substitutions or additions, or of any of said demands, including this note, to apply the residue of the proceeds to pay any or all of said demands, in whole or in part, due or not due, including this note, making rebate of interest upon demands not matured by their terms; and do hereby agree, that at any such sale the said **The Coal and Iron National Bank of the City of New York** may become the purchaser of any or all of said collateral security and may hold the same thereafter in its own right absolutely free from any claim of the undersigned; and do further agree that in case of deficiency the undersigned will pay to the said **The Coal and Iron National Bank of the City of New York** the amount thereof forthwith after such sale with legal interest and do further agree that if at any time in the opinion of the said **The Coal and Iron National Bank of the City of New York,** or any of its officers, the value of the said collateral security or any substituted or hereafter deposited should not be at least .....per cent. more than the amount unpaid of this note, the undersigned will immediately pay on account such amount as will be satisfactory to the said Bank or at the option of said Bank the undersigned will immediately furnish such further security as will be satisfactory to the said Bank and that in case of failure to make such payment or furnish such security, or in case of default in the payment of any obligation (s) of the undersigned to the said **The Coal and Iron National Bank of the City of New York,** this note thereupon at the option of said **The Coal and Iron National Bank of the City of New York** shall become due and payable forthwith, the said **The Coal and Iron National Bank of the City of New York** being also authorized in such case to sell the collateral security or any part thereof as above provided; and in case of the insolvency, general assignment, receivership, bankruptcy or failure of the undersigned, this note and all other obligations of the undersigned, whether as maker (s), endorser (s) or otherwise, owned by the said Bank or holder hereof, shall become immediately due and payable, anything hereinbefore to the contrary notwithstanding; and it is hereby further agreed that upon the transfer of this note **The Coal and Iron National Bank of the City of New York** may deliver the said collateral security or any part thereof to the transferee who shall thereupon become vested with all the powers and rights above given to the said **The Coal and Iron National Bank of the City of New York** in respect thereto, and the said **The Coal and Iron National Bank of the City of New York** shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter. It is further agreed and understood that no delay on the part of the holder hereof, in exercising any rights hereunder, shall operate as a waiver of said rights.

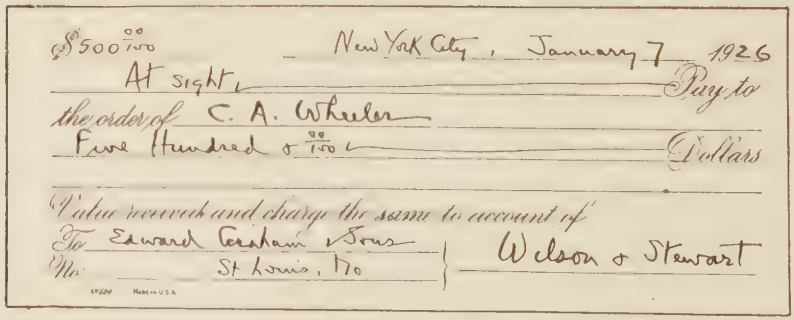
Patrick T. Mulligan

Banks, in lending money, usually require a special form that sets forth fully the rights of the bank. This form of note is shown on pages 290 and 291.

§ 373. **Draft or Bill of Exchange.**—A draft or bill of exchange is an order to some custodian of funds to pay to the person named, or order, or to the bearer, at some stated future time, a definite sum of money. As the draft or bill of exchange is the least familiar to the ordinary person, a little more explanation may be necessary. There are three original parties: (1) the one who signed the bill, who is called the "drawer"; (2) the one to whom it is written, called the "drawee," and who must pay the money if he accepts (after he accepts he is called the "acceptor"); and (3) the one to whom the money is to be paid, called the "payee." This form of negotiable instrument greatly facilitates business transactions between distant places. Formerly the term "draft" was used when the transaction took place within the United States, and "bill of exchange" when the transaction was foreign. But today the shorter term "draft" is almost universally used.

An "inland" draft is one payable in the same state where it is drawn. A "foreign" draft is one payable in another state or in a foreign country.

Here is a typical draft:


500^{00}_{100} New York City, January 7 1926

At sight Pay to

the order of C. A. Wheeler

Five Hundred $^{00}_{100}$ Dollars

Value received and charge the same to account of

To Edward Graham & Sons

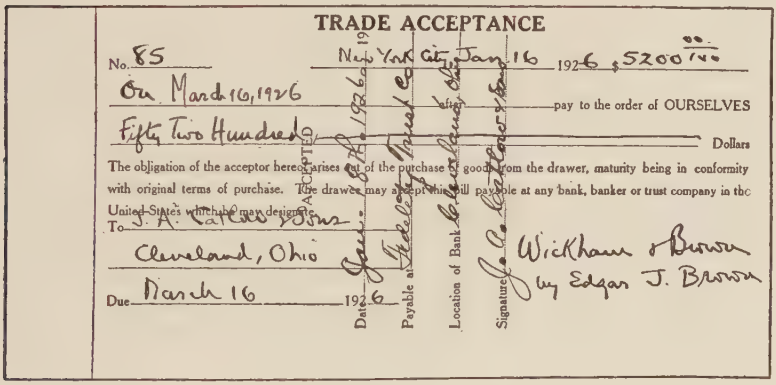
St Louis, Mo

Wilson & Stewart

Drafts are used largely in the remitting of funds from one country to another.

§ 374. **Trade Acceptance.**—A comparatively new and popular form of draft, used particularly by manufacturers and wholesalers is the trade acceptance. This is a draft drawn by the seller on the purchaser for goods sold and accepted by the purchaser.

The following is an example of the trade acceptance:



TRADE ACCEPTANCE

No. 85 New York City, Jan. 16 1926 $5200 00/100

On March 16, 1926 pay to the order of OURSELVES

Fifty Two Hundred Dollars

The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase. The drawer may accept this bill payable at any bank, banker or trust company in the United States which the drawer designates.

To J. A. Lakes Sons

Cleveland, Ohio

Due March 16 1926

Date of Acceptance Jan. 16 1926

Payable at Liberty National Bank

Location of Bank New York City

Signature Wickham & Brown by Edgar J. Brown

It will be noted that the seller draws the draft in his own favor and has it accepted by the purchaser. It is the equivalent of a promissory note by the purchaser in favor of the seller.

With a trade acceptance in hand the seller can more readily get a loan from the bank. Without it all the seller could offer would be his account against the purchaser, but this might be disputed on the ground that the merchandise was not as ordered, not delivered on time, etc. But by giving a trade acceptance the purchaser admits that the contract has been fully performed by the seller. Hence the purchaser could not set up any such defence against the bank, which accordingly is more willing

to make a loan on a trade acceptance than on an assignment of an open account.

§ 375. **Letter of Credit.**—This is an instrument used in the export field. For example, the Blank Export Company of New York City gets an order from Gomez Hermanos of Valparaiso, Chile. The Blank Export Company refuses to sell on credit and Gomez Hermanos do not want to pay in advance,

IRREVOCABLE COMMERCIAL LETTER OF CREDIT No 79402

COPY

THE COAL AND IRON NATIONAL BANK
OF THE CITY OF NEW YORK
CORNER OF LIBERTY AND WEST STREETS
NEW YORK CITY

December 9, 1925.

COPY

Gentlemen:

You are hereby authorized to value on The Coal and Iron National Bank for account of Gomez Hermanos, of Valparaiso, Chile, for an amount not to exceed Ninety-five Thousand and 00/00 ($95,000.00) Dollars, by drafts drawn at ten (10) days sight evidencing shipment of thirty-five hundred (3500) cases of tin plates, 112 plates 270 lbs. (Weight per box) at $27.14 per box, c.i.f. Valparaiso, Chile, from New York, N.Y., U.S.A., to Valparaiso, Chile.

All drafts must be accompanied by full set negotiable clean Ocean Bills of Lading guaranteed on board steamer named and made out to order of Banco de Chile, Commercial Invoice, Consular Invoice, Certificate of Origin, Certificate of Weights, Shippers Certificate

Insurance to be effected by yourselves.

All drafts drawn must bear the following clause:
"Drawn under the Commercial Letter of Credit of the Coal & Iron National Bank No. 79402 ".

and all amounts must be written off on the back hereof.

We hereby agree that such drafts as you may draw by virtue of this credit and in accordance with the above stipulated terms, shall be duly honored upon representation if drawn and negotiated on or before February 1, 1926.

Yours faithfully,

Donald A. Graves
Vice President.

Merton L. Glenn COPY
Vice President.

but are willing to pay when shipments are made. The difficulty is solved by a letter of credit. The Chilean importers arrange with their bank in Valparaiso to have its correspondent bank in New York open a letter of credit in favor of the Blank Export Company. Of course the Chilean house will have to give cash or collateral to the Valparaiso bank or draw on their general credit. The New York bank notifies the Blank Export Company that the letter of credit has been opened and the latter will then utilize the credit by drawing drafts on the bank accompanied by shipping documents evidencing the shipments of the goods ordered.

Thus the exporter is safeguarded by having a responsible and prompt paymaster close at hand: and the importer likewise is protected, because the drafts drawn against the letter of credit will not be accepted unless accompanied by documentary evidence showing compliance with the terms of the contract.

On page 294 is a letter of credit that would be applicable to the transaction described.

The buyer's home bank is known as the opening bank and its correspondent which deals with the seller and accepts his drafts is known as the notifying bank.

Letters of credit are classified as clean or documentary, revocable or irrevocable.

The clean letter of credit states that a credit for a certain amount has been opened in favor of the seller and that this will be paid out on his drafts. As the seller is not required to present any shipping documents, and simply has to draw a draft, he can have the credit for the asking. This is used principally to transfer funds between branches. It is used in connection with foreign sales only when the seller is of the very highest integrity, because the drafts are not secured by any documents.

The more common type is the documentary letter. This requires that the drafts drawn on the credit shall be accompanied by bills of lading, invoices and such other shipping docu-

ments as may be enumerated, and it may contain detailed provisions with regard to the quality and quantity of the merchandise, shipping dates and other conditions.

The letter of credit should state whether it is revocable or irrevocable. If this statement is not clearly made, confusion and serious consequences may result.

The export manager of course desires, whenever possible, to have an irrevocable letter of credit. With this in hand, he is sure to obtain payment, provided, of course, that he makes use of the credit before it expires. The irrevocable letter is usually for a definite period and it expires automatically on the date named, but if the opening bank cancels the letter before the expiration date, the opening bank will be liable in damages to the seller on the same basis that the buyer would be liable for breach of contract. Whether the notifying bank will also be liable will depend on whether the notifying bank sends the seller an advice or a confirmation of the opening of the credit. If it simply sends an advice, it assumes no responsibility whatsoever, whereas if it notifies him that the credit is confirmed, it assumes the position of a guarantor.

The revocable letter may be canceled at any time before it has been made use of by the seller. If the seller has drawn drafts for part of the amount of the credit, such drafts must be honored, but the balance of the credit may be cancelled.

Drafts drawn on the letter of credit must comply with the terms of the letter; otherwise, they may be rejected. For example, a letter of credit may require the merchandise to be of a certain specified character; or it may require shipment by a certain date, and the shipping documents may show that these or similar requirements have not been complied with.

On the other hand, the seller's failure to comply with the terms of the sales contract does not give the bank the right to refuse to accept the seller's drafts. It has been held, both by the American and the English courts, that the sales contract is an independent contract and that the letter of credit is not to

be modified or affected by the terms of the sales contract. Of course, as suggested above, the letter of credit itself may embody some of the conditions of the sales contract, and if it does so, those conditions must be observed. That is because they are a part of the letter of credit.

§ 376. **Certificate of Deposit.**—This is a receipt given by a bank to a depositor acknowledging the receipt of a deposit of a certain amount and promising to pay it out on the order of the depositor. For example, a man has a large sum that will be required in a few days for a special payment. He may not wish to place it in his regular account, or he may be temporarily in a city or town where he does not maintain a bank account. He deposits the funds in a bank and gets a certificate of deposit.

There is no uniform form for the certificate. As the New York Court of Appeals said in Sander *v.* New York Security Co., 178 N. Y. 208: "There seems to be no uniform usage in commercial circles or with monetary institutions as to forms. Some are plainly negotiable, some equally plainly are not negotiable, while between the two extremes are many of the debatable class."

§ 377. **Bonds and Coupons.**—The ordinary corporate bond is negotiable, because it is payable to bearer. But the registered bond is not, because it can be transferred only on the books of the corporation.

Coupons, attached to bonds, are usually so worded, as to be promissory notes payable to bearer.

Interest warrants are not negotiable, because they are simply evidences of indebtedness and are not payable to order or to bearer.

§ 378. **Other Instruments.**—Bills of lading, warehouse receipts and stock certificates technically are not negotiable instruments because they are instruments for the payment of money, but in practice they have acquired certain negotiable

qualities so that it may be said that they have at least a quasi-negotiability.

Review Questions

1. Define a promissory note.
2. What additional provisions may be put into a promissory note?
3. What is a judgment note?
4. Define a draft.
5. Write out forms of a promissory note and of a draft.
6. What is a trade acceptance?
7. What are the advantages of using a trade acceptance?
8. Explain the use of letters of credit.
9. Explain the meaning of the following terms as applied to letters of credit: clean, documentary, revocable and irrevocable.
10. What is a certificate of deposit?

CHAPTER XLI

NEGOTIATION

§ 379. **Methods of Negotiation.**—Negotiation means that the instrument has been transferred in such a way from one person to another that the transferee is the legal holder of the instrument and entitled to sue upon it.

If the instrument is payable to bearer or to cash or has been indorsed in blank, it may be negotiated by delivery without any indorsement. On the other hand, if it is payable to the order of some person, that person must indorse it in order to negotiate it, or there will be a break in the title of the holder.

The indorsement must be written on the instrument itself or on a piece of paper attached to the instrument. Usually, of course, the indorsement is on the back of the instrument. But an unexplained signature appearing any place on the instrument may be treated as an indorsement. The indorsement must be of the entire instrument. An indorsement of part of the amount due to A and the balance to B is not allowed, because then the question would arise as to whether A or B would be entitled to hold the instrument. Under those circumstances, of course, it could not be negotiated. If part of the amount due has been paid, however, this payment may be noted on the instrument and an indorsement made of the balance due. The only effect of this is to reduce the amount due; the negotiability of the instrument is not impaired.

§ 380. **Types of Indorsements.**—There are five types of indorsements:

1. Blank
2. Special

3. Restrictive
4. Qualified
5. Conditional

§ 381. **Blank Indorsement.**—For purposes of illustration, let us assume that a certain note is payable "to the Order of John Fox." Fox desires to negotiate the note to Edward Constable. He does this by writing on the back of the note his name, "John Fox." This is what is called an "indorsement in blank." By thus signing his name, the payee indicates that he is relinquishing all rights that he has to the instrument. He does not direct that the note is to be paid to any particular person or under any conditions; he unqualifiedly signs away his rights. Consequently, the instrument, so indorsed, is a bearer instrument, that is, it is payable to any holder regardless of how he got it. A thief or a finder would not be entitled to collect on the instrument so indorsed, but if such a person presented the note to the maker and the maker, thinking that the party presenting it was the rightful owner, paid it in good faith, the maker would be protected and the real owner of the note would not be able to recover anything on it.

So it will be seen that an indorsement in blank is dangerous. The holder who gets a note so indorsed may, to protect himself, write above the signature, a direction to pay to himself. This protects him inasmuch as the note so indorsed cannot be cashed without his signature. Using the same illustration, he writes in above the signature of John Fox, the phrase, "Pay to the Order of Edward Constable."

§ 382. **Special Indorsement.**—The form given in the last paragraph is a special indorsement. It will be noticed that in this form of indorsement, the indorser names a certain indorsee to whom the instrument is payable. The indorsee must indorse if the negotiation of the instrument is to be continued.

It is not necessary in the indorsement to use the words "or order" or "or bearer." So the indorsement "Pay to Edward

Constable" has the effect as "Pay to the order of Edward Constable."

§ 383. **Restrictive Indorsement.**—The restrictive indorsement takes one of the following forms:

1. It prohibits the further negotiation of the instrument. Example: "Pay to X only."
2. It constitutes the indorsee the agent of the indorser. Example: "Pay to the Merchants National Bank for collection."
3. It vests the title in the indorsee in trust for some other person. Example: "Pay to Peter Thompson as attorney for John Monahan."

The restrictive indorsement is evidence to all subsequent parties that the indorser did not intend to part with his title to the instrument, but simply constituted the indorsee his agent or representative in connection with it. The restrictive indorsee cannot sue the indorser, but he may sue the prior parties; he is entitled to receive payment on the instrument and to sue if necessary. If the indorsement is for collection, he may transfer the instrument in order to collect it.

This indorsement restricts the negotiability of the instrument.

§ 384. **Qualified Indorsement.**—The qualified indorsement limits the liability of the indorser. The usual method of making a qualified indorsement is by using the phrase "without recourse." For example, if John Fox desires to indorse in this way, his indorsement would read: "Pay to the order of Edward Constable, without recourse. John Fox."

An indorsement of this sort does not affect the negotiable character of the instrument. It simply restricts the liability of the indorser. The effect on his liability will be discussed in Chapter XLIII, "Liabilities of Parties."

§ 385. **Conditional Indorsement.**—A conditional indorsement imposes some condition on payment; for example: "Pay to Edward Constable upon delivery of motor truck on March 1, 1920. John Fox."

This is not binding upon the maker. So he may safely pay the instrument when due to Edward Constable regardless of whether or not the motor truck was delivered on March 1, 1920. The maker is entitled to pay the instrument when due to the last holder. Nevertheless, the condition does apply to Edward Constable. So if he collects and the condition is not performed, he would have to pay to John Fox.

§ 386. **Indorsement of Bearer Paper.**—The rule is that a bearer instrument, not only one originally payable to bearer but also one that has become so by blank indorsement, remains a bearer instrument. Consequently, if a bearer instrument is indorsed specially, it may nevertheless be negotiated without the indorsement of the special indorsee; but the special indorser will not be liable, because his responsibility runs only to such persons as take title through his indorsement.

§ 387. **Transfer Without Indorsement.**—The Negotiable Instruments Law provides in §49:

> "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

For example, Jones is the holder of a note that Brown discounts. Jones gives Brown the note but neglects to indorse it. Brown then returns the note to Jones for indorsement. Jones hypothecates the note with the X bank for a loan. Brown is

not a holder in due course, but a mere assignee and his interest, being the same as Jones's, is subject to the claim of the X bank.

§ 388. **Striking Out Indorsements.**—The holder may strike out any indorsements not necessary to his title. The indorser whose indorsement is thus stricken out and all indorsers subsequent to him are discharged from liability. If the indorsers are A, B, C, and D, the holder by striking out C's indorsement would automatically release D, for the latter when he endorsed relied in part at least upon C's indorsement.

§ 389. **Special Points Relating to Indorsements.**—Where an instrument is payable to two or more persons, all must indorse, unless they are partners or the one indorsing has authority to indorse for the others.

An instrument drawn or indorsed to a person as "Cashier" of a bank is deemed prima facie to be payable to the bank and may be negotiated by the indorsement of either the bank or the cashier.

Where the name of a payee or indorsee is misspelled, he must indorse as he is described but may add his correct signature.

An indorsement by a minor will not be valid against the minor, if he takes advantage of the defence of infancy; but such an indorsement will not affect the validity of the instrument—it will be a perfect link in the chain as far as third parties are concerned.

The same will be true of an ultra vires indorsement by a corporation.

Review Questions

1. What is the meaning of the term "negotiation"?
2. When may an instrument be negotiated by delivery without indorsement?
3. Is it allowable to indorse a part of the amount due to one party and the balance to another party?
4. Give illustrations of blank and special indorsements.

5. If you receive a note or check indorsed in blank, how can you protect yourself from the danger involved in the loss of the instrument?
6. What is the effect of a restrictive indorsement?
7. Give illustrations of qualified and conditional indorsements.
8. Does a conditional indorsement have any effect upon the maker?
9. Discuss the indorsement of a bearer instrument.
10. What is the effect of the transfer by delivery of an instrument payable to order?
11. What is the effect of striking out an indorsement?
12. When an instrument is payable to two or more persons who are not partners, how should it be indorsed?
13. When your name has been incorrectly spelled as the payee of a check, how should you indorse the check?

CHAPTER XLII

RIGHTS OF HOLDER

§ 390. Holder in Due Course.—The Uniform Negotiable Instruments Law uses the phrase "a holder in due course" to express the idea of an innocent holder for value; that is, one who has taken the instrument without knowledge of anything unusual in connection with it and who has given a valuable consideration for his title. Such a holder of a negotiable instrument may sue on it in his own name.

The requirements for the holder in due course are the following:

§ 391. (1) Completeness and Regularity of Instrument.—The instrument must be complete and regular on its face.

The instrument must appear to be one issued in the ordinary course of business. Hence, if it has any blank, alteration, or erasure or appears in any way irregular, any party to whom it is offered should be on his guard and make an inquiry because if he takes the instrument he will not be able to claim the special rights and immunities of a holder in due course.

Examples: The following instruments are not complete and regular: a note payable "on or before four .... after date"; an accepted bill of exchange lacking the drawer's signature; a printed corporate note signed by the president only although the note is so printed as to call for the signature of both the president and the treasurer.

§ 392. (2) Holder to Take Instrument Before Overdue.—The holder must take the instrument before it is overdue, i.e., on or before the day of maturity.

Negotiable instruments are normally paid on time and when one becomes overdue we have an indication that something is probably wrong.

If the instrument is payable at a fixed time, the maturity date is certain. But if it is payable on demand, it would mature within a reasonable time after issuance. In a few states there are statutes defining what is a reasonable time, but in most states what is a reasonable time depends entirely upon the facts of the particular case, affected of course by any business customs that may be involved.

An instrument payable in instalments becomes overdue in its entirety upon the failure to pay a single instalment, but the failure to meet an interest payment does not mature the instrument unless there is a special provision to that effect. But the transferee would be put on inquiry if he knew of the interest default and his good faith would be a question for the jury to decide.

§ 393. (3) Holder to Take Instrument in Good Faith and for Value.—The holder must take the instrument in good faith and for value.

The good faith requirement does not mean that the holder must be alert and critical, but it does mean that he must make a careful inquiry if he has knowledge of any unusual circumstance, such as an offer to sell a note at a price far below its face value. In such a case the lack of good faith would be even more apparent if the purchaser knew nothing and made no inquiry about the solvency of the maker. Another example would be that of a president of a corporation paying his individual debt with a corporate check signed by him as president. The creditor should investigate before accepting the check. The president may be authorized to issue the check, but if not, the creditor may have to pay back the money to the corporation.

Taking a bill of exchange before it has been accepted does not indicate bad faith, because it is customary to negotiate bills of exchange, particularly to banks, before they are presented for acceptance.

What constitutes value has already been discussed, but there

are some special questions to consider. Sometimes a man who is not himself a holder in good faith and for value discounts the note with the bank. The bank acts in entire good faith but may not qualify as to the value requirement. It all depends on whether the depositor has drawn out the amount credited to him on the discount. If so, yes: but if the money is still in the bank, no.

Merchants National Bank *v.* Santa Maria Sugar Co., 162 App. Div. 248

P had discounted for a depositor a note of D. The question was whether P had given value. The depositor had drawn out the amount credited to him by P for the discounted note, but by subsequent deposits he had maintained the account in excess of the amount of the note.

Held: P was a holder for value. The rule is that a payment made on a general account, with no instruction as to its application, is to be applied to the oldest item. (Case in §362 on another point.)

Of course, if the bank has certified a check against the deposit, this is the same as having paid out the money.

Another question is whether taking a note in payment or as security for an antecedent indebtedness is value. If taken in payment, yes. If the note of a third party is transferred by A to X merely as security for A's old debt to X, the general rule regards this as value, but in New York the decisions (though somewhat conflicting) seem to be that this is not value.

§ 394. (4) Holder to Take Instrument Without Notice of Any Defects.—The holder must have taken the instrument without notice of any infirmity in the instrument or defect in the title of the transferor. The title of the transfer is defective in this sense when he obtained the instrument or any signature to it by fraud, duress, coercion, fear, theft, or by giving an illegal consideration or when his negotiation of it would constitute bad faith or fraud. But § 56 of the Negotiable Instru-

ments Law provides that the holder is not chargeable with notice of defects unless he "had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounts to bad faith."

Of course, the knowledge must have been acquired by the holder before paying value. If the information came to him after he had paid for the instrument, his position is not impaired.

§ 395. Rights of Holder in Due Course.—Such a holder stands in a strong and usually unassailable position. He will not be subject to any personal defenses.

The personal defenses are fraud, duress, undue influence, lack of consideration, payment, unauthorized and improper delivery, violation of a condition, and in most cases illegality.

The holder in due course will of course, be subject to the real defenses. These are forgery, alteration, incompetency, lack of execution, and in some cases illegality.

The subject of defenses is discussed fully in §§ 410 and 411.

§ 396. Rights of One Who Is Not a Holder in Due Course.—When the holder cannot qualify as a holder in due course he, of course, is subject to personal defenses.

But if there are no personal defenses he has nothing to fear. For example, assume that a note was given for value by A to B who transferred it without consideration to X. This gratuitous transfer is no concern of A's, because the note being valid, B could do what he pleased with it.

An exception to the principle involved is made in the case of a holder "who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument." He is allowed to exert all the rights of such holder. This is an apparent rather than a real exception, because the holder in due course would be handicapped and unfairly restricted in his right to pass on negotiable paper

unless he could transfer all of his existing rights to his purchaser.

Review Questions

1. Can a person who takes an undated note be a holder in due course?
2. Will a person who accepts a check bearing an apparent erasure over which something has been rewritten, be a holder in due course?
3. If you take a note that is overdue, will you be a holder in due course?
4. Does an instrument become overdue upon failure to make (1) an installment payment and (2) an interest payment?
5. Discuss the requirement of good faith.
6. When is a bank a holder for value with respect to a note discounted by it?
7. What is the advantage of being a holder in due course?
8. What is the status of a person who, though not himself a holder in due course, gets the instrument from a person who is in that class?
9. A pays $400 for a note which is made out for $1,200. A takes the note before maturity and he knows from his own information that the maker is solvent. Is he a holder in due course?

CHAPTER XLIII

LIABILITY OF PARTIES

A. Liability of Maker

§ 397. **Liability of Maker.**—The maker of a promissory note engages to pay the note he issues according to its tenor and he is primarily liable. Should it be paid by one of the indorsers, the maker will have to reimburse the indorser.

The maker is liable even though the note is not presented to him when due. This means that suit may be brought against the maker without first making a demand for payment. This rather strange to say, is true even on a demand note. The theory is that that the demand was impliedly made at the time the note was issued. Of course, as a practical matter, a demand is almost always made before starting suit, because it would be foolish to waste time and money in litigation if payment could be obtained by a mere demand.

The only effect of failing to present a note is that the maker will not be liable for interest subsequent to the due date or for court costs if he can show that he was able to pay on the due date.

B. Liability of Acceptor

§ 398. **No Liability Until Acceptance.**—The drawee on a bill of exchange becomes liable only when he accepts. Unless and until he accepts he has no obligation whatsoever on the bill itself. But his failure to accept might be a breach of a contract with the drawer.

Example: An agent having in hand funds of the principal is bound to accept all drafts drawn by the principal up to the

amount of the funds in his control and his refusal to accept a draft would make him liable to the principal, but would not make him liable on the draft.

§ 399. **Method of Acceptance.**—If the drawee decides to accept, he writes "Accepted" on the draft and signs his name, and if it is payable after sight, he puts in the date. The drawee is not restricted to the word "Accepted" and he may use some similar word or expression, such as "seen," "honored." The acceptance must be written: it cannot be oral or implied from conduct. It is usually written on the draft, but it may be on a separate paper.

The acceptance must be signed.

§ 400. **Time of Acceptance.**—The drawee is allowed 24 hours after presentment to decide whether or not he will accept. This is to give him an opportunity to check his records and books to ascertain if he has sufficient funds of the drawer to pay the bill, etc. If the acceptance is given, it dates from the day of presentation.

§ 401. **Retention or Destruction of the Bill.**—If the drawee destroys a bill that was presented to him for acceptance or refuses within 24 hours after such delivery or within such other period as the holder may grant, to return the bill, he is held to have accepted it. Under such conditions the acceptance is not a true one, but simply implied in law to work out justice.

An accidental destruction of the bill does not constitute an acceptance. A mere failure to return the bill, in most states, is not acceptance—there must be a demand and a refusal.

§ 402. **Effect of Acceptance.**—The acceptor by his acceptance:

1. Admits the existence of the drawer, the genuineness of the drawer's signature and his right and capacity

to draw the draft. Hence he could not raise the point that the drawer was fictitious or that the drawer's signature was forged and that the drawer was an unauthorized agent, a minor or insane.

2. Admits the existence of the payee and his capacity to endorse.
3. And engages to pay the instrument, according to the tenor of the acceptance if he gives a general acceptance, and according to the qualified terms, if he gives a qualified acceptance.

As to the forged bills, it is clear that the acceptor is liable if the drawer's signature turns out to be forged. But what of his liability where the amount has been raised by a forgery. According to the statute that he "engages to pay the instrument, according to the tenor of his acceptance," it would seem that he should be liable for the raised amount and the courts in some states have so held. However, in New York, despite this clear language, the courts stick to the old common rule (apparently abrogated by this section of the statute) that the drawee, while supposed to know the drawer's signature, cannot be expected to know the amount of the bill and therefore should be responsible if the sum named has been raised.

National Park Bank *v.* Saitta, 127 App. Div. (N. Y.) 624

D accepted a draft drawn upon him. The draft was indorsed to P, a holder in due course. On being sued, D set up that the acceptance was without consideration.

Held: For P. The acceptor may not raise the question of consideration against a holder in due course.

§ 403. **General or Qualified Acceptance.**—An acceptance is either general or qualified. If the drawee accepts the bill as drawer, he gives a general acceptance. The acceptance is general even though a place of payment is named, because this is simply a convenience to the parties, but if it is expressly

made payable at a certain place only, then the acceptance is qualified.

Example: "Accepted, Nov. 15, 1924, payable at the Bank of America, Jonathan Smith"—this is a general acceptance.

An acceptance is qualified, which is

1. Conditional. *Example:* "I accept this bill, payable when I obtain proceeds of shipment for which this draft is drawn."
2. Partial. *Example:* The drawee of a bill for $500 writes on the bill "I accept for $100."
3. Local. *Example:* "Accepted, November 15, 1924, payable at the Bank of America only, Jonathan Smith."
4. Qualified as to time. *Example:* A bill payable 10 days sight is accepted as payable 30 days sight.
5. Accepted by some but not all of the drawees.

The holder, of course, does not have to take a qualified acceptance. He may refuse it and treat the instrument as dishonored. In that case he may bring suit against all parties even though the instrument, except for the dishonor, would not yet be due.

The holder by taking a qualified acceptance releases the drawer and the indorsers, because he is changing the terms of the contract. But the drawer and the indorser will remain liable if they expressly or impliedly authorize the holder to take a qualified acceptance or subsequently assent to it. The holder should notify the drawer and the indorsers of the qualified acceptance. If the drawer or any endorser wishes to repudiate it, he must so notify the holder within a reasonable time because his failure to speak will be construed as his acquiescence. This is one case in the law where silence becomes assent.

§ 404. Acceptance by Separate Instrument.—Usually the acceptance is written on the bill of exchange itself and the

holder is entitled to demand that this be done, but it may be written on a separate paper. Such a separate acceptance is effective in the hands of any person to whom it was shown and who, in reliance on it, took the bill for value.

Also an unconditional written promise to accept a bill or series of bills subsequently to be drawn is an actual acceptance in favor of any person who pays value for such a bill on the faith of the written promise.

The traveler's and the commercial letter of credit are examples of this.

C. Liability of Drawer

§ 405. Liability of Drawer.—The drawer makes himself responsible for the bill on certain conditions. He agrees that the bill, if properly presented to the drawee, will be accepted or paid or both, and that if it is dishonored, either by non-acceptance or non-payment and the proper proceedings on dishonor be taken, he will pay the instrument to any holder or to any indorser who may be required to pay it.

D. Liability of Indorser

§ 406. Liability of Indorser.—An indorser, unless he uses a qualified indorsement, undertakes that he will pay the instrument if: (1) it is duly presented and not paid, and (2) he is duly notified of the dishonor or non-payment of the instrument.

He virtually guarantees the solvency of the party primarily responsible, that is, the maker or the acceptor, provided a proper demand for payment is made and he is promptly notified of the non-payment.

In addition to this responsibility, the indorser also warrants the following:

1. That the instrument is genuine and in all respects what it purports to be. Consequently, if the instrument

is not enforceable against the maker, drawer, or acceptor because of forgery, the indorser cannot use that defense. He must pay in spite of the forgery.

2. That the instrument at the time of the indorsement was a valid obligation. This warranty precludes him from using the defense of illegality at the inception of the instrument.
3. That all prior parties had capacity to sign. This means that the indorser cannot use the defense that the maker was a minor or that the maker, if a corporation, had no power to issue the instrument.
4. That he has good title to the instrument.

Prescott National Bank *v.* Butler, 157 Mass. 548

When P sued D as indorser of a promissory note, D set up that the note was illegal because executed and delivered on Sunday.

Held: For P. This defense was not available to D, because an indorser warrants the legality of the instrument.

§ 407. Liability When Negotiation Is by Qualified Indorsement or by Delivery Only.—Where the instrument is negotiated by qualified indorsement or by delivery without any indorsement, the transferor does not undertake that the instrument will be paid but he does undertake all of the warranties given above, except (2), although he does warrant that he has no knowledge of any fact which would impair the validity of the instrument, or render it valueless.

In case there is no indorsement and negotiation is by mere delivery, the warranties apply only in favor of the immediate transferee.

Littauer *v.* Goldman, 72 N. Y. 506

D sold and delivered a promissory note to P without indorsement. P, finding out that the note was void by statute, because a part of a usurious transaction, sued D.

Held: For D. A transferor without indorsement does not guarantee the legality of the instrument.

§ 408. Order of Liability Among Indorsers.—If there are a number of indorsers, they are among themselves presumed to be liable in the order in which their indorsements appear. Hence, if an earlier indorser pays the instrument, he may hold the later indorsers. Of course, the indorsers may have made a special agreement to the order of their liability and this would govern.

The holder does not have to regard the order of liability. He may hold one or more of the indorsers and leave it to them to fight out their respective liability with the others. Usually, however, the holder will sue the maker and all the indorsers together.

E. Liability of Accommodation Party

§ 409. Accommodation Party.—An accommodation party is one who signs a negotiable instrument in order to lend his credit to the instrument. Bank loans are often made on this basis. A man who lacks sufficient credit to get a bank loan is often able to get the necessary loan through the signature of a friend or business acquaintance having sufficient standing with the bank. Usually the accommodation signature is an indorsement, but it may be arranged that the accommodation party sign as maker, drawer or acceptor instead.

The accommodation signature is liable even though the holder knows that he received no value.

However, the accommodation party is liable only to those who took the instrument before it became due.

§ 410. Personal Defenses.—The defenses to negotiable instruments are divided into personal and real defenses. A personal defense is one which can be asserted only against an immediate party or against one who is not a holder in due

course, for example, the defense of fraud. If the payee has procured a note from the maker by fraud, the maker when sued by the payee may use the defense of fraud. He may use this defense even though there have been several indorsers, provided none of them is a holder in due course. But this defense would be of no avail against a holder in due course. The personal defenses in addition to fraud are duress, undue influence, lack of consideration, payment, unauthorized or improper delivery, violation of a condition, and in most cases, illegality.

§ 411. **Real Defenses.**—A real defense is one that can be asserted against anyone, that is, even against a holder in due course. It is a defense that goes to the nature or execution of the instrument. If a statute specifically states that a note or a bill of exchange given in connection with certain transactions shall be void, such an instrument so given will not be of any avail in the hands of even a holder in due course. But unless the statute does definitely state that the instrument shall be void, the mere fact that it is an incident of an illegal transaction will not destroy its effect in the hands of a holder in due course. The other real defenses are forgery, alteration, infancy, and want of execution. If a man's name is forged to a check, he is not responsible for the check because he never made it. Likewise if a check is signed by a minor, he may successfully plead his defense of infancy against anyone. Or if an incomplete instrument, that is, one containing blanks is stolen, and then the blanks are filled out, the maker will not be liable because he never executed or delivered the instrument.

Review Questions

1. What is the liability of the maker of a note?
2. What effect, if any, will a failure to present a note for payment have on the maker?
3. What, if any, is the liability of a drawee for a refusal to accept?
4. What is the usual method of acceptance?

5. How much time is the drawee allowed to determine whether he will accept?
6. Under what circumstances will an acceptance be implied?
7. If you have a bill of exchange payable on a certain definite date, would there be any object in presenting it before that date to the drawee?
8. Can the drawee, after acceptance, refuse to pay the draft on the ground that the signature of the drawer is a forgery?
9. Can he after acceptance refuse to pay on the ground that he has discovered that the amount of the draft was raised before it was presented to him for his acceptance?
10. Give illustrations of a qualified acceptance.
11. What effect does a qualified acceptance have on the liability of the drawer and the indorsers?
12. How does the liability of a drawer of a draft compare with that of the maker of a note?
13. How do the warranties of the indorser differ from those of the transferor without indorsement?
14. Who is an accommodation party?
15. What is the difference between personal and real defenses?
16. What are the personal defenses?
17. What are the real defenses?
18. X thinks that he is signing a subscription blank for a set of books, but in reality the paper is a cleverly contrived promissory note. This note is negotiated and gets into the hands of an innocent party. Can this innocent party recover on the note against A, the maker?
19. X is induced to buy a typewriter by false representations. He gives a note in part payment. When he finds out that he has been defrauded, he notifies the payee that he will not pay the note; but in the meantime the payee has negotiated the note to W who is an innocent purchaser for value. Can W recover on the note?
20. If X fills out the date of a check and signs his name, but does not fill out the other spaces, and then the check is stolen and completed by the thief and ultimately gets into the hands of an innocent party who pays value, will that party be able to collect on the check from the man who signed his name to it?

CHAPTER XLIV

PRESENTMENT

A. Presentment for Payment

§ 412. Necessity for Presentment.—The so-called primary parties, i.e., the maker of a note, and the acceptor of a bill, are liable without presentment. As to them the only effect of failing to present the instrument for payment is that they will be discharged from any liability for interest after the due date and for court costs, if they can show that they had the funds to pay at the proper time and place.

A demand note even though it carries interest need not be presented in order to hold the maker.

According to this principle the failure to present a note at the designated bank where funds were available would not release the maker even though the bank subsequently failed. This seems unjust and in some states it has been held that the maker would be released under such conditions.

As to secondary parties, i.e., the drawer of a draft or the indorser, presentment for payment is always necessary. If proper presentment is not made the secondary parties will be released.

§ 413. Time of Presentment.—Where there is a fixed date of maturity, the instrument should, of course, be presented on that date.

A demand note should be presented within a reasonable time in order to hold the indorsers. There is no set rule as to what is a reasonable time. It depends entirely upon the circumstances. In one case it was held that two months was

too long, and in another case that eighteen months was reasonable.

As to a bill of exchange payable at sight, the Negotiable Instruments Law provides that "presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

With regard to a check, commercial usage prescribes that a reasonable time for presentment in order to charge the indorser is the day following the receipt of the check but where the check is payable in another place it is sufficient to start the check on the course of collection the following day after its receipt. In cities where there is a clearing house system, it is usually held that presentment to the clearing house the day after the check is received is sufficient.

In order to hold the maker of the check, presentment is required as indicated above; but ordinarily this may be made at any time within the statute of limitations. The maker cannot plead delay in presentment unless he can show that he thereby was injured. For example, if the maker had money in the bank to pay the check and it was not presented and subsequently the bank failed, the holder would have to bear the loss. This of course, would not be true if the maker had not had sufficient funds on deposit to meet the check.

Zalvom *v.* Gamin, 72 Misc. 36

P, payee, having received D's check after banking hours, deposited it the following day in his own bank which the day following caused the check to be presented through the Clearing House to D's bank, where payment was refused as the bank had suspended payment that very date.

Held: For P. This was presentment within a reasonable time. The usage of trade and business in presenting checks for payment has become incorporated into the banking business of the state and would be seriously affected if immediate presentment to the paying bank were required.

Schlesinger *v.* Schults, 110 App. Div. (N. Y.) 356

The question was received as to whether a note payable "on demand after date" is a demand note or a time note, payable one day after the date.

Held: This is a demand note.

An instrument payable on Sunday or on a holiday should be presented on the next business day.

§ 414. **Requirements for Presentation.**—The following are the requirements for presentment:

1. By the holder, or by a person authorized to receive payment for him.
2. At a reasonable hour on a business day. This depends upon business customs. Where the instrument is payable at a bank it should ordinarily be presented during banking hours.
3. At a proper place (see § 415).
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where presentment is made. In the case of partners presentment to one partner is sufficient.
5. By the exhibition of the instrument. A mere reference to the instrument without showing it would be insufficient. Where the instrument is backed up by any collateral such as a bill of lading it is not necessary to produce the collateral.

State of New York Bank *v.* Kennedy, 145 App. Div. 669

The Cashier of P which sued indorser informally demanded payment several times but never made a formal demand or presented the note.

Held: For D. An informal request for the payment of a demand note, not accompanied by a presentment, is insufficient to charge an indorser.

§ 415. **Place of Presentment.**—As to the place of presentment the Negotiable Instruments Law provides that presentment is proper when presented as follows:

1. Where a place of payment is specified in the instrument, and it is there presented.
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented.
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Where a note is payable at a bank which holds the note no presentment is necessary other than having the note at the office of the bank.

Where the place of presentment is specified presentment must be made there even though it is known that the maker or acceptor has moved to some other place.

Iron Clad Mfg. Co. *v.* Sackin, 129 App. Div. 555

P, suing D as indorser, proved that the note payable at a specified branch office of a trust company had been presented at the central office of the trust company.

Held: For D. Presentment at the "place of payment" required by the Uniform Law means presentment at the place named, not merely presentment to the corporation.

§ 416. **When Presentment Is Not Required.**—In the following situations presentment is not required:

1. As to drawer, "where he has no right to expect or require that the drawee or acceptor will pay the instru-

ment," e.g., where the maker has stopped payment on a check.

2. As to indorser, where the instrument was made or accepted for his accommodation.
3. Where reasonable efforts have been made but without success to make presentment.
4. Where the drawee is a fictitious person.
5. Where there is a waiver of presentment. For example, the indorsers assure the holder that the maker cannot pay at maturity or they ask the holder to grant an extension. A waiver of protest or of notice of dishonor does not include a waiver of presentment.

B. Presentment for Acceptance

§ 417. **When Presentment Is Required.**—In the following cases presentment for acceptance must be made.

1. Where the bill is payable after sight.
2. Where the bill expressly stipulates that it be presented for acceptance.
3. Where the bill is payable elsewhere than at the residence or the place of business of the drawee.

In other cases the parties sometimes find it desirable to present for acceptance. If the holder wants to know whether he can rely on the payment of the bill he can present it for acceptance in advance of the due date.

§ 418. **Effect of Failure to Present.**—Where presentment is required, the holder must present it for acceptance or negotiate it within a reasonable time and his failure to do so will release the drawer and the indorsers.

§ 419. **Requirements for Presentment.**—The requirements for presentment for acceptance are the same as for presentment for payment. (See § 414.)

§ 420. Presentment When Drawee is Dead or Bankrupt.—If the drawee is dead presentment may be made to his executor or administrator or the bill may be regarded as dishonored.

Where the drawee is bankrupt, presentment may be made to him or to the receiver or trustee. It will be noticed that this is not consistent with the case of the deceased drawee because in that case death may be regarded as dishonor; whereas in the case of bankruptcy presentment is required although it is a mere idle ceremony.

§ 421. When Presentment Is Excused.—Presentment for acceptance will be excused where the drawee is dead or is incompetent or has absconded or is fictitious and also where after diligent efforts presentment is found to be impossible.

§ 422. Duty and Rights of Holder on Non-Acceptance.—Where acceptance of a bill is refused, the holder must treat the bill as dishonored and give notice of dishonor to the maker and the indorsers; otherwise, they will be released.

The holder may sue all parties at once. He need not present for payment or wait for the maturity date but may regard the failure to accept as an anticipatory breach of contract.

Review Questions

1. What is the reason for the rule that the maker or acceptor of a negotiable instrument is liable, even though the instrument is not presented to him for payment?
2. In contrast to this, why do we have the rule that the indorsers are not liable unless the instrument is presented promptly for payment?
3. In order to charge the indorsers, to what party must the instrument be presented for payment?
4. When should a bill of exchange payable at sight be presented for payment?
5. When should a check be presented?
6. Would it be proper to present an instrument for payment on Sunday?

7. How late in the evening may an instrument be presented?
8. When presentment is made, is it necessary to exhibit (1) the instrument and (2) any collateral for the instrument?
9. What is the proper place for presentment?
10. Under what circumstances will presentment be excused?
11. If a note is payable in New York and the maker is in Chicago at the time that payment falls due, should the note be presented to him in Chicago?
12. If the maker cannot be found, what should be done in regard to presentment?
13. In what cases is presentment for acceptance required?
14. Upon refusal of acceptance, what steps should the holder take?

CHAPTER XLV

NOTICE OF DISHONOR AND PROTEST

§ 423. Necessity of Notice.—As explained in the previous chapter, presentment is, with some exceptions, required to hold makers and indorsers.

But in addition they must be given a notice of dishonor, when the instrument has been dishonored by non-acceptance or by non-payment.

Such notice enables the secondary parties to arrange to take care of the obligation and to endeavor to secure prompt reimbursement from any party or parties who may in turn be liable to them.

§ 424. Effect of Notice.—The secondary parties are entitled to only one notice. Where a proper notice is given by the holder at the time of dishonor, the notice inures to the benefit of all subsequent holders. It also will run in favor of all parties prior to the holder who are entitled to recourse against any party to whom the notice was given. For example, if D, the holder gives notice of dishonor to A, the maker, and to B and C, the indorsers, and collects from C, then the latter, availing himself of D's notice, may hold A or B.

When a party receives notice of dishonor, he may, in order to play safe, serve notice on parties prior to himself.

§ 425. Time of Notice.—The Negotiable Instruments Law fixes the time of notice as follows. Where the parties reside in the same place:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

Where the parties reside in different places:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

If the notice is mailed properly stamped and addressed, within the specified time, it is deemed a good notice.

§ 426. **Where to Send Notice.**—If the party has given an address, notice should be sent there. Otherwise it should go to the post-office nearest his residence or to the post-office where he is accustomed to receiving his mail. If he lives in one place and has his business in another, notice may be sent to either place. But where the party is sojourning elsewhere, the notice may be sent to the place of his sojourn.

§ 427. **Form of Notice.**—The notice may be informal, provided it is clearly worded so as not to mislead the party to whom it is sent. It may even be oral. Or it may be partly written and partly oral, as where an insufficient written notice is amplified by an oral explanation. However, good business practice requires a complete written notice of which an exact and compared copy is retained.

The notice may be delivered personally or by mail.

It may be given to the party or to someone acting as his authorized agent.

§ 428. Actual but Irregular Notice.—Actual notice within the time limit will always be sufficient, regardless of the form and the place of notice. It is necessary to adhere to the formal requirements only when there is a doubt as to whether actual notice can be effected.

§ 429. When Notice Is Not Required.—Notice of dishonor is not required to the drawer in any of the following cases:

1. Where the drawer and the drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment.

§ 430. Protest.—Protest is the formal act of a notary public or other proper party in protesting against the non-payment or the non-acceptance of a negotiable instrument. Usually a notary is employed, but the protest may be made by a resident of the place where the dishonor occurs in the presence of two witnesses.

The procedure of protest is to present the instrument to the primary party, then to make out the certificate of protest and to mail copies of this to all secondary parties.

Protest is required only in the case of foreign bills of exchange. In certain other cases it may be desirable in order to make sure of a proper presentment and notice of dishonor. The laws provide that a certificate of protest shall be *prima facie* evidence of the facts contained in the certificate.

The following is a form of protest:

United States of America, State of New York, } ss. On the 15th day of January 1926

at the request of Francis Hudson

I, Paul L. Malcolm a Notary Public of the State of New York, duly commissioned and sworn, did present the original promissory note hereunto annexed, to Edgar W Funston and demanded payment but he ~~who~~ refused to pay the same

Whereupon I, the said Notary, at the request aforesaid, did Protest, and by these presents do publicly and solemnly Protest, as well against the Drawer and Endorsers of the said promissory note as against all others whom it doth or may concern, for exchange, re-exchange and all costs, damages and interest already incurred, and to be hereafter incurred for want of payment of the same.

Thus done and Protested in the City of New York, aforesaid, in the presence of John Doe and Richard Roe, witnesses.

IN TESTIMONIUM VERITATIS.

Paul L Malcolm
Notary Public.

United States of America, State of New York, } ss.: I, Paul L. Malcolm a Notary Public of the State of New York, duly commissioned and sworn, do hereby Certify, that on the 15th day of January one thousand nine hundred and twenty-six due notice of the presentment and protest of the said promissory note after demand and refusal of payment thereof, by notice, partly written and partly printed, signed by me, was given by me to the following respective endorsers of the said instrument, by depositing the same in the Post Office at New York City (prepaying the postage thereon), duly directed and superscribed to said endorsers, as follows, to wit;

To Donald Wilkinson - 111 Northern Avenue, New York City

Arthur T. Edwards - 290 Riverside Drive, New York City

the above named places being the reputed places of residence of the persons to whom such notice was so addressed, and the Post Office nearest thereto

Notarial Seal

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at New York City

Paul L. Malcolm
Notary Public.

Review Questions

1. What is the reason for the rule requiring the sending of notice where an instrument is dishonored?
2. Within what time should the notice be sent out?
3. Is the notice required to be in any particular form?
4. Is an oral notice allowable?
5. In what cases may notice be dispensed with?
6. What is "protest"?
7. What is the procedure for "protest"?
8. When is "protest" required?

CHAPTER XLVI

CHECKS

§ 431. Definition of Check.—A check, as defined in the Negotiable Instruments Law, is a bill of exchange payable on demand. It is a special type of bill of exchange. It is an order upon a bank to pay on the depositor's account and to pay on demand, whereas many bills of exchange are not payable at banks or on demand.

§ 432. Time of Presentment.—This was discussed in §413.

§ 433. Certification of Checks.—The bank on which the check is drawn may be asked to certify it. If it does so, it accepts the check and holds out (1) that the signature of the maker is genuine, (2) that the depositor's account contains sufficient funds to meet the check, and (3) that the money will not be withdrawn. The practical effect is that the bank deducts the amount of the check from the depositor's account and sets up the amount as a special deposit to meet the check. The legal effect is that the bank becomes liable to any bona fide holder of the check.

Although a special fund is set up to meet the check, this is not a trust fund and the holder of the certified check, in the event of the bank's failure, will not have a prior claim but will be classed with the common creditors.

The certification must be in writing.

When the maker has the check certified, he is not released but remains liable as before. The payee who has a claim against the maker is entitled to payment and does not have to take the bank's promise to pay as a discharge of his claim. However, a payee upon receiving a certified check, should present

it promptly because the maker will be released to the extent that he may be damaged by delay. (See § 413.)

When the holder has the check certified, he releases the maker. Here the holder instead of collecting the check, elects to have the bank hold the money. The effect is just as if he had collected the money and then redeposited it in the bank; he accepts the bank as his depository.

If the bank certifies a check erroneously, it may recall the certification if it notifies the holder before he negotiates it to a bona fide holder or spends money or obligates himself in reliance on the check.

§ 434. Check Is Not an Assignment.—A check is not an assignment of part of the depositor's account. It is simply an order to pay money, and like any other order, it may be countermanded before acted upon. Hence the depositor's order to "stop payment" must be followed by the bank, provided, of course, that the check has neither been paid or certified.

The bank, in refusing payment, whether on the depositor's order or by mistake, is not liable to the holder. The bank owes no obligation to the holder of the check. It is the depositor's agent and responsible to him. If the depositor has sufficient funds in the bank to meet the check and has not recalled it, the bank has no right to refuse payment and if it does so will be liable to the depositor for any resulting injury to his credit reputation.

A maker in stopping payment will make himself liable to a payee who has given consideration or to a holder in due course.

§ 435. Forgery of Checks.—The understanding between the bank and the depositor is that the bank is authorized to make payments on his checks. Hence if the bank pays a forged check, the bank cannot charge the payment against the depositor's account, because it was not his check. The bank must, at its peril, know the signatures of its depositors. Nor in a case of this sort could it recoup from the party who collected the

check, if he was a holder in due course, because the bank in paying a check accepts the signature of the maker as genuine. This rule, of course, does not apply to protect one not a holder in due course.

The bank cannot hold the maker if it honors a raised check. The reason is that in paying such a check it is not following the directions of the maker. If the raising of the check was rendered easy by the carelessness of the depositor in making it out, he will in most states be liable; but in New York the rule is to the contrary.

The bank by certifying a raised check, does not bind itself for the raised amount, according to the common law rule; but some states hold otherwise under the Uniform Act (§ 402).

When the bank pays a check with a forged indorsement, it may not charge the amount against the drawer, because he may be held by the true holder. However, the bank may recover from the party to whom it paid the check, because in paying the check it does not assume responsibility for the signature of the indorsers.

§ 436. **Giving a Bad Check.**—If a maker or a holder passes a check with knowledge that there are no funds or insufficient funds to meet it, he is guilty of the crime of obtaining property by false pretences. If he passes it simply to pay a debt, no crime is committed.

§ 437. **Death of Drawer.**—The bank should not pay any checks presented after the death of the drawer, because agency ceases upon the death of the principal. But if the bank pays a check in ignorance of the depositor's death, it will be protected. In some states it is provided by statute that a bank may honor checks presented within a short specified time after the depositor's death.

§ 438. **Check Marked "Receipt in Full."**—It is not uncommon for a business man to receive from a customer or client

a check for less than the amount claimed but indorsed "this is a receipt in full," or some similar expression. Should such a check be collected and credited as a part payment or returned with a request for a check for the entire amount claimed?

The theoretical answer is that the acceptance of the check will be a mere payment if the account is liquidated and undisputed, but that it will be a settlement if the amount due is unliquidated or undisputed.

The practical answer is that it is rarely safe to use the check, because the courts, desiring to uphold the commercial practice of making settlements in this way, will accept very slight evidence to sustain the check as payment in full.

Review Questions

1. What responsibility does a bank assume in certifying a check?
2. Does the holder of a certified check have a prior claim against the certifying bank?
3. May a check be certified by telephone?
4. Does it make any difference whether the check is certified by the maker or by the holder?
5. May a bank recall an erroneous certification?
6. What is the basis of a bank's liability for improperly refusing to honor a check?
7. Discuss the bank's liability for paying forged or raised checks.
8. What effect does the death of a drawer have on his outstanding checks?
9. Is it safe to accept a check marked "receipt in full" when there is a balance to be paid?

Bailments and Carriers

CHAPTER XLVII

NATURE OF BAILMENTS

§ 439. Definition.—A bailment is the delivery of personal property by one person to another, for some special purpose or period of time and on the understanding that the property is to be returned or otherwise disposed of when the purpose has been accomplished or the time ended.

Loaning an umbrella, leaving an automobile in a garage either for repairs or for storage, shipping a parcel by express or by freight, hiring a truck are common examples of bailments.

§ 440. Parties.—The two parties to the transaction are called the bailor and the bailee.

The bailor is the owner or rightful possessor of the chattel who hands it over to the bailee as the custodian of the chattel during the bailment.

§ 441. Effect of Bailment.—The bailor retains the title or ownership and simply parts with possession for a limited period or for an agreed purpose.

As the bailor retains the ownership, he has the risk of loss, injury or destruction.

§ 442. Difference Between Bailment and Sale.—Sometimes it is difficult to decide whether a transaction is a bailment or a sale or "exchange." For example a farmer delivers wheat to a miller and is to get back flour. Is the flour to be milled from the farmer's wheat or may it be flour from other wheat? If the understanding is that the farmer is to have the flour made

from his own wheat, the transaction is a bailment; otherwise it is an exchange.

The same question arises whenever raw materials are furnished by a party who is to get back a finished product. In order to avoid confusion, the parties should express their intention clearly.

Where the transaction is a bailment, the owner of the materials remains the owner and is protected if the manufacturer becomes bankrupt, but he has the risk of loss or injury to the materials and to the finished product.

Where one party furnishes some materials and the manufacturer supplies additional materials and the labor, the courts of most states, in the absence of a special agreement, hold that the party furnishing the greater part of the value to the finished product is the owner.

§ 443. **Kinds of Bailments.**—A thorough classification is the following:

1. Gratuitous deposit: goods or chattels held by bailee as a favor and without charge to the bailor, e.g., leaving securities in a friend's safe.
2. Commercial deposit: goods or chattels held by the bailee for compensation, e.g., storing goods in a warehouse.
3. Loan for use: chattel loaned to the bailee with permission to use it gratis, e.g., loaning tennis racquet to a friend.
4. Hiring: chattel delivered to the bailee to be used by him for certain purpose or certain period for compensation.
5. Gratuitous bailment for labor and services; goods or chattels delivered to the bailee to be repaired, altered, or improved by labor and services of the bailee without charge.
6. Commercial bailment for labor and services: same as 5 except that the work is to be paid for.

7. Bailment of common carrier.

Another classification, which is the basis for discussion below, is as follows:

1. Bailment for the sole benefit of the bailor, as in classes 1 and 5 above.
2. Bailment for the sole benefit of the bailee, as in class 3 above.
3. Bailment for the mutual benefit of the bailor and the bailee as in classes 2, 4, 6, 7, and 8 above.

§ 444. Liabilities of Bailee in Bailment for Sole Benefit of Bailor.—The extent of liability is determined by the nature of the bailment.

If the bailment is for the sole benefit of the bailor, the latter, inasmuch as he is not giving any consideration to the bailee, cannot expect anything more than slight care from the bailee and such is the limit of the bailee's liability. The bailee will be liable only for gross negligence or for fraud or other wrongful acts.

It is hard to define the terms "slight care" and "gross negligence," because we must always consider the circumstances of the particular case. One would not be expected to guard a pile of lumber as carefully as a tray of diamonds.

A bailment of this type is gratuitous; consequently the bailee is not entitled to any compensation for his care-taking or work done on the property; but the bailee would be entitled to reimbursement for any unusual expenses.

The gratuitous bailee may use the article as much as may be required to keep it in good condition, but he has no right to use it for his own purposes.

Smith *v.* Elizabethport Bank, 69 N. J. L. 288

The cashier of D at P's request placed P's bonds in D's safe. D had no vault and no charge was made for keeping the bonds. An employee of D stole the bonds.

Held: D is not liable. This was a gratuitous bailment and D did not show any want of the ordinary care that is required of a gratuitous bailee.

§ 445. Liabilities of Bailee in Bailment for Sole Benefit of Bailee.—In a case of this sort, the bailee is required to exercise extraordinary care. The borrower uses the borrowed property and pays nothing for it. This, of course, is a very common occurrence. When the housewife borrows a book or a vacuum cleaner from her neighbor, this type of bailment is created.

The borrower would not be responsible in case of theft or robbery provided he had used proper care to guard the article borrowed.

The bailee would not be liable for an accident, provided he were not negligent; but he would be liable for the results of an accident if he departed from his agreement with the bailor.

A bailee of this type of bailment has the right to use the chattel, but he must meet any expense incident to such use. If he borrows a horse, he must feed and stable it, but, although he should call a veterinarian in case the horse becomes sick, the expense of this would be borne by the bailor, because it would be an extraordinary expense.

§ 446. Liabilities of Bailee in Bailment for Mutual Benefit of Parties.—This is a straight business transaction and the bailee should exercise ordinary diligence, i.e., the same care that an ordinary prudent man would exercise in looking after his own property.

§ 447. Liabilities of Bailor.—The chief liability of the bailor is to pay the bailee (except, of course, in the case of a gratuitous bailment), the price agreed upon; or if none was agreed upon, then to pay a reasonable compensation.

It is the bailor's duty to warn the bailee of any latent defective condition of the article that might make it dangerous to the bailee.

If the bailor does not pay, the bailee may retain the goods or chattels that are the subject of the bailment as security, and if payment is not forthcoming, he may after giving proper notice to the bailor and following any other statutory requirements that may be applicable sell the goods or chattels and apply the proceeds against his charges. This is exercising his lien—a subject that is discussed in the next chapter.

Review Questions

1. Define bailment, bailor, and bailee.
2. What are the differences between a bailment and a sale?
3. Classify bailments according to the benefit derived by the parties.
4. What is the liability of the bailee in a bailment for the sole benefit of the bailor?
5. To what extent is this liability affected by the nature of the subject matter of the bailment?
6. What is the liability of a bailee in a bailment for the sole benefit of the bailee?
7. Would he be liable for loss due to theft?
8. Under what conditions would he be liable for loss or damage caused by an accident?
9. What is the liability of a bailee in a bailment for the mutual benefit of the parties?
10. What are the obligations of the bailor?
11. What is the bailee's lien?

CHAPTER XLVIII

TYPES OF BAILMENTS

§ 448. Bailment for Hire.—Typical examples of this type of bailment are the hiring of a horse, automobile, boat, piano, etc.

The bailee's duty is to use ordinary diligence in caring for such articles. He is liable for negligence and not for accidents or happenings beyond his control, e.g., if he drives an automobile carelessly and has a smash-up he is liable; but if he leaves the automobile at the curb and it is stolen, he is not liable.

The degree of care required depends upon the delicacy or durability of the article and upon circumstances. A truck-horse does not require as much attention as a thoroughbred. A set of golf clubs may be left outside the door of a country club with reasonable safety, but it would be rather risky to leave them outside a public restaurant.

The chattels must be used only as agreed upon.

Fisher *v.* Kyle, 27 Mich. 454

D hired a horse from P to drive to a town. The horse was driven beyond that place and then died. P sued D for the value of the horse.

Held: For P. D when he violated the terms of the bailment became liable for any loss.

The bailee, and not the bailor, would be liable for any injuries caused to third parties by the bailee's use of the article.

The bailee has the right to the uninterrupted possession and use of the article during the period of the bailment, but at the end of that time he must return it to the bailor in the same condition, reasonable wear and tear excepted. The bailee must, of course, pay the agreed compensation, or if no fixed amount was arranged, a reasonable amount.

§ 449. **Bailment for Work.**—Examples of this type of bailment are repairs or alterations to a watch, a machine, or a vessel.

Usually the work must be done with expert care, but this has to do with the contract for work or employment rather than the bailment relation.

For the safeguarding of the article only ordinary care is required, but what is ordinary care would depend upon the nature of the chattel. If a machine shop that had been properly locked were burglarized, the proprietor would not have to pay for the stolen machines. But if a watch maker locked his front door but left his safe open and suffered a burglary, he would be responsible for the watches entrusted to him for repairs.

The repair man is of course entitled to compensation for his work and has the right to retain the chattel until paid. This right is known as the artisan's lien, which is discussed in the next section.

§ 450. **Lien of the Artisan.**—This, despite the similarity of title, is entirely different from the mechanic's lien, which is a claim against real property for labor or materials furnished to the property.

The artisan's lien, as indicated in the previous section, is the right to retain a chattel that has been enhanced by the work of the artisan until the price of the service has been paid.

It applies only where the article has been improved.

For example, an advertiser furnishes a printer with both paper and type for the printing of catalogs. The printer has a lien on the catalogs but not on the type, because its value has not been changed. The case of Harris *v.* Woodruff, 124 Mass. 205, where the court upheld a lien for expenses and services in training a horse for the races does not contravene the rule

(although it may seem to at first blush), because the horse had been developed into a race horse.

This lien is dependent upon possession. Consequently if the artisan surrenders the chattel he loses his lien and it is not revived if he should happen to have the same chattel returned to him.

The artisan may enforce his lien by foreclosure.

Sholes *v.* Western Asphalt Co., 183 Pa. St. 528

P held collateral promissory notes of D. These notes contained a clause stating that D had "deposited as collateral security" certain described asphalt blocks "now in the company's yard." P never took possession of the asphalt. P sued to enforce this pledge against the receiver for D's creditors.

Held: For receiver of D's creditors. The pledge is invalid, because there was no delivery of the articles pledged.

§ 451. Bailment for Security (Pledge or Pawn).—The poor man goes to the pawn shop and deposits his watch as security for a small loan. The wealthy broker does exactly the same thing legally when he pledges stock with the bank as security for a large loan.

In each case the borrower is a bailor and the lender a bailee, but to indicate the special type of bailment, we use the terms "pledgor" and "pledgee."

It is not often that ordinary chattels are given as pledges, except in transactions with pawnbrokers. But, it very often happens that bills, notes, stocks, and bonds are used as security for money borrowed. In such cases the term "collateral security" is generally used. Where personal property is used as security for a debt, it is usual to give a chattel mortgage.

The pledge is in some respects like the chattel mortgage (see Chapter LIII) but the latter is a paper transaction and usually the chattel remains in the possession of the debtor or borrower, whereas the pledge requires the actual physical delivery of the article to the creditor or lender. A pledge may

be the result of a written contract, but it may be made merely by a delivery of the property.

To make a valid pledge, delivery is absolutely necessary. Bills, notes, and corporate stocks must be indorsed in blank when used as collateral security. In this case some writing should accompany the pledge to define its terms and prevent misunderstanding. In the case of corporate stocks the pledgee may have the stock transferred on the books of the company and a new certificate issued in his own name.

The care required of the pledgor depends upon the nature and value of the chattel.

The pledgor, upon making good his pledge, is entitled to get back the identical chattel pledged.

If the pledge is not redeemed in due season, the pledgee, after giving due notice to the pledgor, may sell the pledged article. Any surplus, after paying the expenses of the sale and the debt secured, will revert to the pledgor.

§ 452. Bailment for Deposit or Safe Keeping.—The chief example of this is storing goods in a warehouse.

The relation is that of bailor and bailee. The warehouseman is not an insurer and is not liable if the stored goods are stolen or destroyed provided he used proper care, but he has the burden of showing that he was free from negligence.

The warehouseman has an insurable interest. (See Chapter LI.) He may insure the goods in his own name and if loss occurs he may collect the insurance moneys, applying them to his charges and paying the balance pro rata to the owners.

Another bailee of this class is the safe deposit company. It must exercise a far higher degree of care than the warehouseman.

The warehouseman has a lien for his charges. This is enforced without court proceedings, by selling at auction after giving notice to the delinquent party. The warehouseman

should strictly comply with the statutory requirements governing the notice and the sale.

§ 453. **Warehouse Receipts.**—The warehouseman issues a receipt for the goods stored. In commercial transactions, these receipts are important, for they are used as evidence of ownership and as a means of borrowing money.

Warehouse receipts were not considered as negotiable instruments under the common law, but their widespread use in modern commerce demands that they be readily negotiable and consequently the Uniform Warehouse Receipts Acts has given them that character.

Review Questions

1. In a bailment for hire what degree of care is required of the bailee?
2. Is he liable for accidental damage or destruction?
3. Would the bailor or bailee be responsible for injuries to third persons?
4. In a bailment for work what are the duties of the bailee?
5. What is the artisan's lien?
6. What are the limitations upon the enforcement of this lien?
7. Define pledge, pledgor, and pledgee.
8. What are the differences between a chattel mortgage and a pledge?
9. How is a pledge created?
10. What is the proper method of pledging negotiable instruments and corporate securities?
11. How may the pledgee enforce the pledge?
12. In a bailment for safe keeping what is the liability of the bailee?
13. What are warehouse receipts?

CHAPTER XLIX

COMMON CARRIER

§ 454. **Carriers as Bailees.**—A special and important type of bailment is that involved in the transportation of goods. As our commerce and in fact our daily life is dependent upon our transportation system, carriers of merchandise are closely regulated, not only by general laws but also by state and federal governmental commissions.

Carriers are classified as common carriers or private carriers.

§ 455. **Common Carriers.**—A common carrier is one who holds himself out as ready to serve the public without discrimination in the transportation of goods or passengers. Common carriers include railroads, express companies, steamboats, lighters, ferryboats, canal boats, pipe line companies, taxicabs, hacks, etc.

§ 456. **Private Carriers.**—A private carrier is one who is engaged in the business of transportation but who, instead of serving all alike, picks and chooses his customers. For example, a taxicab is a common carrier, but a man who occasionally takes out his automobile for hire for selected parties is a private carrier.

Private carriers, like bailees in general, are liable only for negligence. But common carriers are held to much more stringent liability. They are practically insurers of the goods they carry.

§ 457. **Limitation of Subject.**—Our discussion of carriers will be limited to the most important branch of the subject commercially, i.e., common carriers of goods. We will not

give any further consideration to private carriers or take up the subject of carriers of passengers.

§ 458. **Duty to Serve All Alike.**—As pointed out, the common carrier has a public calling requiring it to serve all alike. If this obligation is not carried out because the carrier does not furnish the necessary facilities or because it discriminates between shippers, it may be held liable for damages and in some cases for criminal penalties. In order to put the carrier in default, the shipper must tender the shipment and the charges to the carrier.

There are certain limitations to this obligation of equal service. The carrier is not bound to accept dangerous goods or improperly packed goods, or any shipments that violate any reasonable regulations that it may have adopted. Furthermore, the carrier is not required to accept shipments beyond its own line.

§ 459. **Liability of the Common Carrier.**—The common carrier is responsible for the delivery in good condition of the goods received. If they are lost or injured, the carrier must pay appropriate damages. However, this rule which makes the carrier virtually an insurer does not apply where the loss or damage is due to any of the following causes:

1. Acts of God, such as lightning, storms, cyclones, tornadoes, floods, hidden obstructions to navigation, etc.
2. Acts of public enemies. This includes acts done by the enemy during war or rebellion, but not the acts of a mob or by rioters.
3. Acts of the public authorities. Examples are the seizure of shipments by attachment or replevin process, and the confiscation of shipments as infected.
4. The inherent nature of the goods. Examples are the decay or deterioration of perishable products and

injuries caused to cattle, horses or other live stock by the fright or viciousness of some of the animals in the shipment.

5. Acts of the shipper. The carrier, of course, is not liable for any losses due to faulty packing, or misdirection. Also the shipper's failure to disclose the contents of the shipment as articles requiring special care because of their fragility or their great value will relieve the carrier from liability for damages.

The carrier may limit its liability provided the shipper receives some consideration for the limitation. The consideration, usually, is a so-called reduced rate. Practically this is a fiction. The carrier does have a higher rate applicable to shipments made without the limitation provision, but such rate is practically never used by shippers.

Such a limitation will protect the carrier from losses due to fire, theft, and other causes beyond the control of the carrier but (except in New York) not from losses caused by the negligence, theft, fraud or wrongful acts of the carrier's own employees. The usual practice is to limit the value of the shipment. The bill of lading usually provides that a certain valuation is to prevail unless the shipper declares the value. If the shipper neglects to state the value then the valuation provision, if it is reasonable, will govern and will limit the carrier's loss to the amount stated.

§ 460. **When Carrier's Liability Begins.**—The liability of the carrier commences when the goods are delivered to it or to its authorized agent at the proper place for the purpose of transportation. If the shipper requests the carrier to hold the goods temporarily or for further directions, its liability during the interval will be that of an ordinary bailee.

§ 461. **When Carrier's Liability Ends.**—The liability of the carrier ends upon delivery to the consignee and also as explained

in the following section upon delivery to a connecting carrier.

The courts have expressed three distinct views as to when the common carrier makes delivery to the consignee and thereby reduces his liability from that of a carrier to that of a warehouseman:

> "First, that when the transit is ended and the carrier has placed the goods in his warehouse to await delivery to a consignee, his liability as carrier is ended and he is responsible as warehouseman only; second, that merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business; third, that the liability of the carrier continues until the consignee has been notified of the receipt of the goods and has had reasonable time in the common course of business, to take them away after such notification." (McMillan *v.* M. S. & N. I. R. R. Co., 16 Mich. 79.)

In some cases the carrier is required to deliver to the consignee's place of business. This subject was discussed as follows by The New York Court of Appeals in the case of N. Y. C. & H. R. R. R. Co. *v.* Gen. Electric Co., 219 N. Y. 227, 235:

> "There must be such a delivery as is customary and reasonable. There was a time, before the days of railroads, when a carrier by land was expected to make delivery at the consignee's home or place of business. That was because he could go there with his wagons. With the days of railroads, delivery came to be expected at freight houses or terminals. They are still the place of delivery where the factories and warehouses of shippers and consignees do not connect with the tracks. In our own time, however, private sidings have become common, and freight is carried over them between the railroad and the plant. Such carriage is commonly a part of the work of transportation. . . . In most cases the distances are short and the carrier's burden remains substantially the same, whether the cars are left upon the siding close to the main tracks or hauled along the siding until they reach the

plant. In such circumstances it may be said with reason that delivery at the plant means delivery at the platform for loading and unloading. The practice of hauling cars to points along the siding convenient to shipper or consignee is known as 'spotting' and is commonly and fully regarded as part of the work of carriage."

Sprague *v.* N. Y. C. R. R. Co., 52 N. Y. 637

P sued for damage to shipment. D defended on the ground that a heavy freshet occurred in the river which overflowed the freight-house and damaged the goods. The shipment had arrived three days before this occurrence and no notice was given to the consignee.

Held: For P. It was D's duty to give notice of the arrival of the goods and having failed to do so its liability as a common carrier continued.

Singer *v.* Merchants Despatch Transportation Co., 191 Mass. 449

P, who was Louis Singer of Boston, gave D for transportation a shipment marked "L. Singer, Springfield, Ill." and the receipt read the same way. P intended the shipment for himself but it was delivered to Lena Singer of Springfield who had regularly been receiving goods over D's line.

Held: For D. The contract of D was to deliver the shipment to L. Singer, Springfield, Ill.

§ 462. **Connecting Carrier.**—Most rail shipments of any considerable length travel over several connecting lines. The initial carrier will not be liable for the shipment after it has been turned over to the connecting carrier unless it was agreed that the initial carrier would carry the shipment to its final destination.

However, the Interstate Commerce Act provides that the initial carrier shall be liable for any losses caused by the acts of connecting carriers and that this liability cannot be contracted away. This applies to interstate, but not to intrastate shipments.

§ 463 **Rights of Carrier.**—The rates of the common carrier are usually specified in a published schedule. In the absence

of any fixation of the rate, the carrier is entitled to a reasonable compensation for the service rendered. The rates of most common carriers in this country are under the control of regulatory commissions. The Interstate Commerce Commission regulates rates on interstate shipments and in nearly every state we find a state commission supervising charges on shipments within the state.

The carrier is entitled to demand payment of its charges in advance and may refuse service to shippers who will not pay in advance. In any case where the charges remain unpaid, the carrier has a lien on the shipments. This lien may be enforced by the sale, upon notice to the shipper, of the shipment to pay the carrier's charges.

The shipper is, of course, liable for the charges. The consignee becomes liable upon accepting delivery.

If the consignee delays in taking delivery, the carrier is entitled to demurrage or warehouse charges for having to continue his custody of the goods beyond the usual period.

§ 464. Bills of Lading.—The carrier gives the shipper a bill of lading. This paper is at once a receipt and a contract. It is a receipt for the merchandise delivered and it is a contract specifying the terms and conditions upon which the goods are to be transported. The limitation of value, discussed in § 459, is usually provided for in the bill of lading. The bill of lading is signed by the freight agent of the carrier and also by the carrier.

The Uniform Bills of Lading Act has codified the law with reference to the rights and liabilities of carriers, shippers and third parties under bills of lading. This act has been adopted in the following states:

Arizona	Illinois	Maryland
California	Iowa	Massachusetts
Connecticut	Louisiana	Michigan
Idaho	Maine	Minnesota

Missouri	North Carolina	Washington
Nevada	Ohio	Wisconsin
New Hampshire	Pennsylvania	Alaska
New Jersey	Rhode Island	Philippine Islands
New York	Vermont	

A uniform bill of lading which has been approved by the Interstate Commerce Commission, is used in interstate shipments. See page 352.

Review Questions

1. Who are common carriers? Give examples.
2. Who are private carriers?
3. What are the differences between common carriers and private carriers?
4. What is the common carrier's obligation as to service to the public?
5. What is his liability for failure to carry out this obligation?
6. What is the liability of the common carrier for loss or injury to the goods during transit?
7. What are the exceptions to this liability?
8. May the carrier limit his liability?
9. What is required to sustain such a limitation?
10. When does the carrier's liability begin?
11. What are the different views as to when the liability of the carrier ends?
12. What does the Interstate Commerce Act provide as to the liability of the initial carrier?
13. To what kind of shipments does this provision apply?
14. How are the rates of the common carrier regulated by law?
15. How is the carrier protected in the collection of its charges?
16. What is a bill of lading?

Uniform Domestic Order Bill of Lading Adopted by Carriers in Official, Southern and Western Classification Territories, March 15, 1922

UNIFORM ORDER BILL OF LADING

(PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION)

Shipper's No. *209*

ORIGINAL

Agent's No. *71*

The Central Railroad Company of New Jersey

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

at *Plainfield, N. J.* *Dec. 12*, 1925

from *Apex Mfg. Co.*

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

The Surrender of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to **ORDER OF** *Edward T. Johnson—115 Central Avenue*

Destination *Jersey City* State of *New Jersey* County of

Notify

At State of County of

Route

Car Initial Car No. *10692*

(Delivering carrier)

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
3	*Radio parts*	*240*		

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

_____ per _____

If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (*See section 7 of conditions.*)

_____

(Signature of consignor.)

If charges are to be prepaid write or stamp here, "To be Prepaid."

_____

Received $_____ to apply in prepayment of the charges on the property described hereon.

_____

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$_____

Apex Mfg. Co. Shipper. *John H. Simpson* Agent.

Per *J. K. Squires* Per _____

Permanent post-office address of shipper _____

ENDORSEMENT

CONTRACT TERMS AND CONDITIONS

SEC. 1. (*a*) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided

(*b*) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(*c*) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

SEC. 2. (*a*) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(*b*) Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed, provided that if such loss, damage, or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed: *Provided*, that in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

(*c*) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided*, That the carrier reimburse the claimant for the premium paid thereon.

SEC. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

SEC. 4. (*a*) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(*b*) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same

at public auction to the highest bidder, at such place as may be designated by the carrier: *Provided*, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: *Provided*, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(*c*) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent, deterioration or further deterioration, sell the same to the best advantage at private or public sale: *Provided*, That in time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(*d*) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(*e*) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(*f*) Property destined to or taken from a station, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and except in case of carrier's negligence, when received from or delivered to such stations, wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

SEC. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

SEC. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

SEC. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading, until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

SEC. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

SEC. 9. (*a*) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(*b*) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(*c*) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(*d*) General average shall be payable according to York-Antwerp Rules, 1890, and, as to any matter not therein provided for, according to the law and usage of the port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(*e*) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(*f*) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

SEC. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Insurance

CHAPTER L

INSURANCE IN GENERAL

§ 465. **Nature of Insurance.**—Insurance is a means of indemnification against loss. The person insured pays a premium in return for an agreement to indemnify him if he suffers a loss from one or more specified contingencies. The theory of insurance is to distribute losses over a group.

Insurance is speculative. The person insured pays a premium but is not likely (in most forms of insurance at least) to secure any return other than the insurance protection. Although the insurance contract contains a gambling element, it is considered as an entirely legitimate contract of indemnification.

§ 466. **The Contract of Insurance.**—The contract of insurance, not being affected by the Statute of Frauds, may be oral, but an oral agreement of insurance is a rarity. Business prudence requires that such contracts be written. The contract is called the "policy." In fire and marine insurance it is customary to issue a provisional contract in advance of the "policy." This provisional contract is called the "binder."

It is sometimes provided that the policy is not to be effective until the first premium has been paid.

§ 467. **The Parties.**—There are two parties to a contract of fire insurance, the insured and the insurer. The person whose property is insured is called the "insured." The person or company that insures it is called the "insurer."

The insurer may be a single individual, a corporation or

an unincorporated company. Or, a group of individuals may get together and insure themselves. This last system of insurance is called "mutual insurance." It is quite common in the country districts, where there may be a township mutual insurance. Whenever a fire occurs all the members of the fund are assessed proportionately to pay the loss.

In the non-mutual companies a fund is created by the payment of premiums, out of which the insurer pays for the losses which may occur.

A man who insures another has an insurable interest in that man's property and may protect himself by reinsuring it.

§ 468. **Agents.**—Most insurance is taken out through agents. These may be of two kinds: (1) those who are paid by the company and are the agents of the company, and (2) those who act merely as brokers and solicit insurance from various companies. If you deal through a broker instead of an agent of the insurance company, the broker is your agent. You and not the company will be bound by his act.

On the other hand, agents acting for the company bind the company by their agreements if they have the power to close contracts of insurance. If the contract is required to be sent first to the company for its approval, the agent will not bind the company by any agreement that he may make.

Sometimes by means of a short written agreement, called a "binding slip," or even by an oral contract, an agent may bind his company for a limited or contingent period, as, for instance, until the policy is made out or while the company is investigating the risk.

In dealing with an insurance agent one should always find out whether the company has to approve his agreement before relying on any changes he offers to make in the policy. It is always safer to get the authorization of the company itself.

The laws of the various states are very strict with regard to insurance agents. To be permitted to act, an agent must usually receive a license from the state superintendent of insurance or whatever other officer exercises corresponding duties.

§ 469. **Good Faith.**—Insurance requires a high degree of good faith. The reason for this is that the facts bearing on the risk are known to the insured but usually not to the insurer; consequently the latter must rely to a large extent upon the former.

§ 470. **Concealments.**—In line with this requirement of good faith, the insured is bound to communicate all material information to the insurance company. If he conceals or withholds any facts affecting the risk he may vitiate his policy. But as most insurers require applicants for insurance to fill out rather lengthy questionnaires, thereby indicating what information they regard as material, the courts usually take the position that a concealment will not void the policy unless it is an intentional concealment.

§ 471. **Representations.**—A representation is a statement made by the insured in connection with the application for insurance. If the statement is one of sufficient importance to affect the judgment of the insurer as to the acceptability of the application, the insurer is entitled to rely upon it. Hence a false statement of that character would give the insurer the right to deny liability on the policy.

Friedman *v.* Fire Association, 168 Pa. 249

P secured a fire policy on a stock of merchandise in a store on the representation that it was owned by and in charge of a successful business man, whereas P, a married woman, was the owner but exercised no supervision over it. P sues D to recover under the policy.

Held: For D. This was a misrepresentation that voided the policy.

§ 472. **Warranties.**—As representations are not legally effective unless they are material to the risk, and as this is a question that is often of uncertain determination, insurers usually provide in the policy that certain statements are to be considered as warranties. A warranty is a statement or an obligation that the insured is bound to carry out regardless of its materiality or importance. However, the courts have modified the drastic character of the law with respect to warranties so that in most jurisdictions a breach of warranty will not avoid the policy unless the misstatement was made with intent to deceive the insurer or had the effect of misleading the insurer as to the nature or extent of the risk involved.

Review Questions

1. What is the theory of insurance?
2. What is a binder?
3. What is the difference between mutual and non-mutual companies?
4. What difference does it make whether one deals through an agent or broker?
5. In taking out a written policy of insurance, is it safe to rely upon the agent's oral agreement to alter the policy?
6. When will a concealment by the insured give the insurer the right to void the policy?
7. What is the difference between representations and warranties?

CHAPTER LI

TYPES OF INSURANCE

(1) Fire Insurance

§ 473. Insurable Interest.—The person insuring a building must have some financial interest in the property insured; otherwise it would amount merely to a bet on his part as to whether the building would be destroyed by fire or not and would be illegal as a gambling agreement.

Riggs *v.* C. M. Insurance Co., 125 N. Y. 7

P sued D on an insurance policy issued by D to P upon the hull and equipment of the steamer "Falcon." P had no interest in the property, except that he owned 36 shares of stock in the corporation that owned the "Falcon."

Held: P had an insurable interest, as he had a pecuniary interest in the property insured.

An insurable interest does not require ownership. A mortgagee has an insurable interest; likewise a tenant.

With respect to personal property, warehousemen, common carriers, commission merchants and pledgees have insurable interests.

§ 474. The Policy.—Policies may be either open or valued. Most fire insurance policies are open. In an open policy the amount payable in case of loss is not fixed by the policy but merely the limits within which the company will be liable. A valued policy specifies the amount payable in the event of a total loss. When a fire occurs the company pays the actual value of the loss up to the amount named in the policy.

It is a legal maxim that "to include is to exclude," and the insurance policy covers only what is stated therein. Some

states allow oral agreements with, or representations made by, agents to be proved in order to alter the policy, but others do not. If it is desired to make other agreements not included in the policy form, they should be in written form and made a part of the policy by attaching them to the policy. Such supplemental agreements are called "riders."

What the Policy Should Include.—Every policy of fire insurance should include as full and accurate a description of the property covered as possible. Personal property must be described as located at such and such a place; and if it is moved, a new policy must be taken out or the original policy extended to cover it, as the character of the building in which it is kept affects the risk very materially.

A policy made out to cover "merchandise" or "household goods" will cover such as may be acquired later as well as those which the insured owns at the time of taking out the policy.

It should also include the amount for which the insurance is taken out, the terms for which the policy is to last, the rate of premiums and at what time payable, and any other conditions which the parties wish to make a part of the agreement.

Cancellation.—A fire insurance policy may be canceled by either party upon five days' notice, a proportionate amount of the premium paid being returned to the insured when the company makes such cancellation.

§ 475. **The Property Insured.**—The property insured may be either real or personal. A policy may cover both, as for instance a dwelling house and furniture.

What May Be Insured.—Any kind of tangible property may be insured. Deeds, bonds, shares of stock, book accounts, bank notes, promissory notes, and bills of exchange, etc., are not insurable, as they represent merely an interest which the party has in some property and, if they are destroyed, the claim may be proved by witnesses without them.

What May Be Insured Against.—A fire insurance policy insures for damages other than those caused by actual flames. Injury due to the heat of a fire in an adjoining building would be recompensed, as would also damage caused by the means used to extinguish a fire, or damage caused by removing the goods to a place of safety even though it later developed that such moving need not have been done. To insure against damage by lightning where there was no actual ignition, a special lightning clause must be attached to the policy.

Floating Stock.—A merchant may insure his stock with the understanding that it is to be replaced by other material of the same kind. His policy would be known as a floating one, and in case of damage he may recover on the stock on hand when the fire occurred, regardless of what stock was on hand when the policy was issued.

Coinsurance.—A coinsurance clause stipulates that, in return for a reduced rate, the insured must insure his property up to a certain percentage of its value, usually 80 per cent, and if he fails in so doing he must himself bear a proportion of any loss, thus making him a coinsurer with the company of his own property.

For instance, if his property is worth $10,000, an 80 per cent coinsurance clause would obligate him to carry insurance to the amount of $8,000. If he carried only $6,000 and a loss occurs, he would be paid only such a percentage of his loss as the insurance he carried is to the amount he agreed to carry, in this case three-fourths. Therefore, if fire damaged his property to the extent of $4,000, he would receive only three-fourths of this amount, or $3,000.

§ 476. Warranties in Fire Policies.—Some of the warranties usually found in policies of fire insurance are the following:

1. That there will not be any change in the title or the possession of the property.
2. That no additional insurance will be placed on the property.
3. That the premises will not be left vacant for longer than a period specified.
4. That the insured will not do anything to increase the risk.

All of these warranties usually contain the saving phrase "except with the consent of the company." Such consent is usually readily obtained, but the necessity of such consent should not be overlooked as otherwise the policy may be voided.

For example when property is sold, the insurance company or companies that have granted coverage on the property should be notified immediately and asked to transfer the policies to the new owner. This they cannot be required to do, as fire insurance policies are not assignable because of the personal element involved, but the companies will grant such transfer practically as a matter of course in nearly all cases.

(2) Life Insurance

§ 477. **Nature of Contract.**—Life insurance today is one of the most important businesses in the country. Before the invention of the mortality tables the rates were high and the business was on too uncertain a basis to be widely utilized. With its present development it has become of the greatest value as a means of saving, investing, and protecting business. Its value as a protection against a dependent old age has caused governments throughout the world to become interested in it, different forms of old-age insurance being in use in various countries and among the state employees of Massachusetts.

§ 478. **Insurable Interest.**—Like the contract of fire insurance, the contract of life insurance is a speculative one. If a person attempts to insure the life of someone other than

himself, he must have an insurable interest in it, though this interest need not continue during the life of the insured nor exist at his death. One may, however, insure one's own life and make such insurance payable to a beneficiary who has no insurable interest in one's life.

An insurable interest in a human life is not easy to define. Generally the party who does the insuring must be related to the insured by such ties of blood, marriage, or contract that the death of the insured would materially injure him. A married couple have an insurable interest in each other's lives; a father has an insurable interest in the lives of his children because they might some day support him; a sister may insure her brother for similar reasons; a partner may insure the life of his copartner; a creditor may likewise insure the life of a debtor; or a clerk has an insurable interest in the life of his employer.

§ 479. **The Parties.**—The parties to a life insurance policy are the person whose life is insured, or the applicant; the person for whose benefit it is insured, or the beneficiary; and the person or company insuring it.

Life insurance may be conducted either through a corporation, or through a fraternal organization, or it may be mutual. Many of the large life insurance companies are either mutualized, or are mutualizing. In a mutualized life insurance company, all excess over actual cost of insuring is later returned to the policyholders as dividends. In a stock corporation, this excess goes to the stockholders.

Fraternal benefit insurance exists among the various masonic and other orders and in many business organizations. It is a form of mutual life insurance. When a benefit falls due, it is raised by assessment on the members in proportion to their rights to benefit by the fund, or else a fund is raised by assessment and kept on hand to meet the benefits as they become due.

§ 480. **The Policy.**—Policies are of various forms. In participating policies, the accumulated surplus in any year is divided among the policies and the share of each is credited to it, to be paid over when the policy becomes due.

In non-forfeitable or incontestable policies, the company agrees that after a certain period of time the policy shall not be forfeited for any cause except non-payment of premiums. Courts will usually enforce this agreement.

Policies may be whole life, that is, the premiums continue to be payable until the death of the person whose life is insured. If the policy is a participating one, the dividends may either be applied to reduction of the premiums, or may be accumulated, as the holder prefers.

Another form of policy is limited payment life. The premiums on this class of policy are so divided as to be payable within a limited number of years. After this the policy becomes a paid-up policy and is payable on the death of the person whose life was insured. There are also endowment policies and term policies. Under the endowment policy the amount is payable either at the end of a fixed term of years, or upon death, in case of death before the expiration of that period. This policy operates both as an investment and a protection.

Term insurance is insurance for a fixed term of years at minimum cost. It does not provide for any accumulations or permit the holder to take out a paid-up policy at the end of the term.

§ 481. **Application and Examination.**—If the company does not consider the life a good risk, it has a right to reject the application. The applicant is required to answer questions on an application blank and to submit to a medical examination. As the application blank is made a part of the policy, any statements on it amount to warranties, and the policy will be of no value if any of them are false. If, otherwise than on the blank,

the insured makes any false representations which have any effect on the risk or the insurance, the policy is voidable at the option of the insurer.

§ 482. **Premium Rates.**—The premium rates in life insurance are worked out by means of the mortality tables. These are tables based on an examination of statistics, giving the probable length of life at certain ages.

If these premiums are not paid when they are due the policy becomes forfeited; but the company must give notice to the person whose life is insured, or to the assignee if the policy has been assigned, and notice to him again each time a premium becomes due. The company may extend the time of payment or take a note for the amount.

§ 483. **Right to Change Beneficiary.**—Unless there is a clause in the policy reserving the right to change the beneficiary, no change can be made without his consent in writing. The beneficiary has a vested right in the policy—one which he can himself transfer to someone else. In some states, even in the case of his death, the profits of the policy will go to his estate and no one else can be named.

The consent of the company must always be obtained to any change of beneficiary. This consent must be in writing.

§ 484. **Assignment of Policy.**—A policy of life insurance may be assigned if it permits a change of beneficiary. The company must be notified of this assignment.

§ 485. **Settlement of Losses.**—When he makes his claim for the proceeds of the policy, the beneficiary must send with it a proof of death filled out on one of the company's forms and certified to by a physician.

Where there has been a change of beneficiaries or the policy has been used as security, there may be conflicting claims for the proceeds. If the various claimants can agree among them-

selves, the company will generally pay the loss to those who are admitted to be entitled to it, upon receiving releases from all the claimants. If there is a dispute which cannot be settled otherwise, it usually has to be decided in court.

The company will resist the payment of claims if there was any fraud in the procuring of the policy or if misrepresentations as to the health of the insured come to its knowledge.

Suicide, unless committed within a year from the time the policy was taken out, does not generally excuse the company from payment. Many policies provide that if the insured is killed while engaged in the commission of crime or executed as a punishment for crime, the policy will not be payable. The death must be the result of the crime in order to render the policy void. Dying of apoplexy while attempting to hold up a train would not excuse payment.

(3) Sundry Types of Insurance

§ 486. **Enumeration.**—In addition to fire and life insurance, there are sundry other insurance contracts, such as marine, accident, liability, casualty, burglary, plate glass, boiler, tornado, fidelity, rent, title, burial, live stock, hail insurance, etc.

In all of these the policies call for certain representations, which must be truthful; proofs of loss must be made out and, as a usual rule, sworn to, when payment of a loss is claimed.

§ 487. **Marine Insurance.**—Marine insurance is the oldest form of insurance—older than either fire or life insurance. It originated in Lloyd's Coffee House in London, and the policy is known as Lloyd's. The policies were passed around and everybody took a share in the risk. In case of loss they were assessed in proportion to their subscriptions to pay the loss. These subscribers were called underwriters.

Today the business is handled by regular incorporated companies. Its object is to protect the insured against losses on a

vessel at sea. Marine policies may also be taken out on ships traveling in any navigable waters.

The policy covers losses by fire, various forms of shipwreck, including losses incurred in trying to avert shipwreck, and losses from piracy. The insured is by custom held to be duty bound to give the insurer all information in his power with regard to the ship, the voyage, the cargo, or anything else that might affect the risk. If he conceals anything or makes any false representations, the policy will be void. The person taking out marine insurance always warrants that his vessel is seaworthy; if this is untrue, the insurer will not be liable.

In a marine policy, the amount payable in case of loss is fixed by the policy. Marine policies also cover what is known as "general average."

§ 488. **General Average.**—From the earliest times, it has been the custom, where goods were thrown overboard at sea to save the vessel, for the other owners of merchandise on board and the owners of the vessel to contribute to make good the loss. The underwriter, as the insurer is called in a marine policy, takes upon himself the responsibility of collecting this contribution. "Particular average" means actual insurance on the particular thing insured and is paid by the insurance company.

Proofs of loss, giving full particulars of the nature, amount, and cause of the damage must be made out and sworn to by the master and crew of the vessel; and then an investigation is made either by some government surveyor of the port, or by experts chosen by the parties to the contract. In the event of a dispute as to the amount of the damage, the damaged goods are sold at auction and the amount determined in that way. The insured must show bills of lading or other documents to prove his ownership of damaged goods, and the policy cannot be assigned without the underwriter's consent.

§ 489. **Accident Insurance.**—Accident insurance is insurance against injury or death by accident. The policy may cover injury only, or it may also provide for a payment to a beneficiary in case of the death of the insured by any accident. The proceeds are payable to the person himself in case of injury. These policies do not cover mere illness, but such things as ivy poisoning, etc., which are regarded as accidents, are included.

Sometimes there is a dispute as to what constitutes an accidental injury. Thus, although infected water might be drunk through accident and serious illness result, one could not collect an indemnity; whereas one could collect on injuries due to mistakenly taking poison for medicine, inhaling gas, etc.

Many companies will not pay if the insured exposed himself to unnecessary risk, such as jumping on a moving streetcar; nor will they pay for injuries received while intoxicated.

All accident policies provide lump sum indemnities for such injuries as the loss of a hand, etc.

§ 490. **Health Insurance.**—Some companies insure against sickness and ill health. Usually these policies name a list of diseases in event of which a weekly indemnity is granted. In some cases the health insurance is allowed only in conjunction with accident insurance. Some of the fraternal orders allow their members sick benefits which are the equivalent of health insurance. Practical difficulties in administering the business of insuring against sickness have limited its development.

§ 491. **Liability Insurance.**—The purpose of liability insurance is to protect the employer from liabilities arising under the Employers' Liability or Workmen's Compensation Acts. In many states it is possible to take out this form of insurance with a state fund. There is also automobile liability insurance, which covers liability for injuries to others resulting from the use of the automobile. Railroad companies may take out insurance (carriers' liability insurance) to protect them against

liability to passengers and others, for injuries arising from railroad accidents.

§ 492. **Burglary Insurance.**—This is one form of what is known as "casualty insurance," that is, insurance against accidents to property of various kinds other than loss by fire. It is, as the name implies, insurance against loss of property by theft. It applies only when the theft is committed by someone's breaking into the house or building where the property is kept, unless the policy states otherwise. It would not cover having one's pocket picked.

§ 493. **Title Insurance.**—To protect purchasers of real estate against the expense of lawsuits arising from possible defects in the title to the property, a business of investigating and insuring the title has grown up. Title insurance companies generally furnish both title searches and insurance. As with most other insurance of this nature, the company generally settles the claim or defends the suit on notice from the insured that he has been served with a notice of suit.

§ 494. **Sundry Insurance Contracts.**—

Automobile Insurance.—Many companies offer automobile insurance. What is known as a "full cover" on an automobile includes insurance against the hazards of:

1. Fire or explosion.
2. Transportation, i.e., derailment and collision.
3. Theft.
4. Damage by fire to personal effects carried upon the car.
5. Damage to other property by being in collision with the automobile insured—known as property damage.
6. Damage to the automobile insured by being in collision with some other object.
7. Loss of life or injury to the occupants of the car and legal liability for expenses in connection therewith.

8. Loss of life or injury to others and legal liability for expenses in connection therewith.

The rates are high to compensate for the very considerable risks. What is known as the "moral hazard," i.e., the risk of unfair dealing by owners, is great, and hard to guard against. The enumeration of hazards shows the varied possibilities of loss and damage.

Boiler Insurance.—This is insurance against injuries to property arising from boiler explosions, another form of casualty insurance. A fire insurance policy does not cover such losses unless the explosion resulted from a fire.

Fidelity Insurance.—Fidelity insurance is insurance against losses arising from fraud or dishonesty on the part of agents.

Credit Insurance.—Credit insurance is insurance against the dishonesty and insolvency of debtors.

Tornado Insurance.—As its name indicates, this is insurance against damages and loss of property arising from tornadoes.

Burial Insurance.—This form of insurance is in operation among the very poor. In return for certain weekly or monthly payments, the company guarantees to pay the expenses of a decent burial.

Rent Insurance.—This is insurance for the loss of rents owing to the failure of tenants to pay rent, or to a destruction of the property by fire or some other calamity.

Strike Insurance.—An employer can even insure himself against strikes on the part of his employees, and the consequent losses.

Plate Glass Insurance.—This is insurance on plate glass windows because of the great expense of replacing them.

Review Questions

1. What is an insurable interest?
2. Does a mortgagee have an insurable interest in the property mortgaged?
3. If a man makes a contract to sell his house to X, would X have an insurable interest in the house?
4. A fire insurance policy covered furniture which was described in the policy as being located in a certain house. The furniture was removed to another dwelling but no change was made in the policy and the insurance company was not notified. In the event of a loss, could the insurance be collected on the policy?
5. Does a stockholder have an insurable interest in the property of the corporation?
6. A man sells his house which he has had insured. Shortly after the sale and before the old policy has been changed or a new one taken out, the house burns. Can the new owner recover on the former owner's policy?
7. A man's property is worth $80,000. He has it insured for $60,000. He has a loss of $4,000. Can he recover all of this from the insurance company. If not, how much can he recover? Why?
8. Has a theatrical manager an insurable interest on the life of an actor who is under contract to act for him?
9. Has a niece an insurable interest in the life of an uncle?
10. What are the different forms of life insurance policies?
11. If a premium is not paid when due, what option does the company have?
12. If a man takes out a policy for the benefit of his wife and then divorces her, can he make some one else the beneficiary without her consent?
13. Is it possible to make out a policy to your estate as the beneficiary?
14. Is the insurance company liable on the policy when the insured commits suicide?
15. What kinds of losses are covered by a policy of marine insurance?
16. What is the duty of an insurer in taking out marine insurance?
17. If a marine policy is taken out for an ocean voyage and a vessel is built for river trade, would the failure to disclose the fact that the vessel had been built for river navigation only have any effect on the policy?
18. What is the meaning of the term "general average"?

19. Would the drinking of poison by mistake be an accidental injury under a policy of accident insurance?
20. What arguments can you suggest in favor of health insurance?
21. What are the various forms of liability insurance?
22. Why is employers' liability insurance especially important today?
23. What is the meaning of "title insurance"?

Personal Property

CHAPTER LII

CHARACTERISTICS AND TITLE OF PERSONAL PROPERTY

§ 495. Personal Property Defined.—Personal property consists of tangible things of all sorts, such as grain, wool, sheep, cattle, cloth, tools, etc. It also consists of leases of real property and all rights in real property which are of less dignity (not less duration) than a life estate. (See § 513.) In legal estimation a lease or estate for any fixed time, even for a thousand or two thousand years, is considered of less dignity than a life estate. Any interest in real property which is measured by years is regarded as personal property. The only exceptions are "easements." (See § 516.)

Personal property includes goods and chattels and also what are legally termed "choses in action," that is, rights of action, or anything which would give one a right of action against another for money or property A debt is a chose in action. A promissory note, a bill of exchange, a corporate bond, or share of stock gives a similar right of action and is known as a chose in action A right of action for damages to property is a chose in action. A right of action for personal injuries is peculiar to the person injured and may not be assigned.

Patents, trade-marks, and copyrights are also choses in action and personal property. They are valuable forms of property which give one a right of action to protect his exclusive right to sell his own inventions.

§ 496. Real Property Defined.—Real property, on the other hand, consists of land, or of any estate in land which is to last for one's own life or that of another, or of what are known

as easements. These are rights to some profit or beneficial use which one may have in or over the estate of another. (See § 516.)

Houses and buildings are regarded as part of the land and are real property.

§ 497. Questionable Cases.—Generally, it is easy enough to distinguish real from personal property. The difficulty arises when one considers such things as growing trees, plants, etc., that are fastened to the soil itself. (See § 510.)

§ 498. Fixtures.—Fixtures are articles of personal property that have been affixed or annexed to realty, such as machinery attached to a building or a statue set in the ground. Whether such fixtures are to be regarded as real or personal property is often a difficult question. It will depend upon the following:

1. The mode or degree of annexation. If machinery is so firmly attached to a factory that its removal would cause serious injury to the building, it will usually be considered as part of the realty. On the other hand electric and gas light fixtures that can be readily removed will usually be regarded as personal property.

2. The purpose or use to which the portion of the realty to which the fixture is annexed is to be put. Where a church was designed with a recess for an organ and the organ was required to complete the building, it was held that the organ was part of the realty and passed to the purchaser of the church.

3. The intent of the parties. This is usually shown by the relationship of the parties. As between landlord and tenant it will be presumed that articles put in by the owner are part of the building but that fixtures introduced by the tenant are annexed to the realty provisionally and are removable by him. Tenants of business premises are treated very liberally in this respect in order to encourage industry. It has even been held that engines walled in by specially constructed brick arches were

removable by the tenant. In order to remove any doubt it is safest to have a definite written agreement in every case.

§ 499. **Original Title.**—The origin of the right to personal property is in either occupancy or labor. A man has a right to take a wild animal or a fish, seaweed, or anything still in a state of nature and which belongs to no one else. By the act of taking the article it becomes his, and the law will protect him in his right.

The right to property through labor may be of two sorts. Where a man works for another, he earns wages for his services. The wages which he receives are his property, but the results of his labor belong to the man who is paying for them. On the other hand, where a man not working for another, by his labor produces something, he has a right to what he has produced. For instance, where a man writes a book, invents a labor-saving device, designs a dress, or draws up plans for a public building, the book, the device, the design, or the plans are his own property. To protect his rights, he should secure a copyright or patent.

Copyrights are issued by the United States for twenty-eight years and patents for seventeen years.

In the same way, the right to property may be acquired through discovery. If a man should discover a buried treasure left behind by Captain Kidd or some other pirate, the treasure would become his. When lost property is found it belongs, of course, to the true owner if he can be discovered. If he cannot, the finder has a right to the property. The owner of lost or stolen property may reclaim such property from its possessor even if the latter, not knowing it had originally been stolen, paid a full price for it.

§ 500. **Derived Title.**—Most of our rights to personal property nowadays, except those that come from our own labor, come to us by title derived from someone else. We either

buy property or have it given to us by someone else. Our right to it is then derived from the former owner.

Property may be bequeathed by will, transferred by actual gift, or acquired for a consideration. Where the state gives the right to property to anyone, it is known as a "grant." In England, all gold and silver mines belong to the king, and he grants them to whom he wishes. When a person dies without leaving a will, his personal property is distributed to such of his nearest relatives as are legally entitled to it. Those who receive it in this way take title by descent. When personal property is left to anyone by will, the person receiving it takes it as a legacy and is called a "legatee."

§ 501. **Accession.**—Another way of acquiring title to personal property is by what is known as "accession."

Accession is the addition made to property, either by natural increase, as in the case of flocks and herds, or by increase of its value through labor, or by annexation, as in the case of attaching fixtures to realty. The addition, whatever it may be, belongs to the owner of the principal piece of property, even though the material added may be of a great deal more value than the thing itself. A piece of machinery might be entirely rebuilt and would still belong to the original owner.

Still another form of accession consists of alluvial deposits, i.e., soil washed up by the sea and deposited on shore.

§ 502. **Confusion.**—Sometimes property belonging to two or more different people becomes mixed together so that it is impossible to distinguish it. This is called "confusion of goods." If the confusion happens by mistake, each party is entitled to a share as nearly equal to his original share as it is possible to estimate. If one of the parties deliberately brought about the confusion, he may secure what belongs to him only if he can clearly and unmistakably prove the

amount to the satisfaction of the court. If he cannot, the whole belongs to the innocent party.

§ 503. **Kinds of Ownership.**—Personal property may be owned entirely by one person, or it may be owned by two or more persons jointly or in common.

Ownership in Common.—A right to property in common means that the two or more owners enjoy the use of the property together during the lifetime of all of them; and upon the death of any one of them, those who the law says are entitled to his estate have a right to come in and enjoy his share of the property together with the surviving owners. If they wish at any time to divide their shares, they may either agree among themselves to do so or resort to an action at law to have it divided for them.

Joint Ownership.—When the ownership is joint, both of the persons enjoy the property so long as both remain living, and upon the death of either the whole property goes to the survivor. This right of the survivor to take the whole property is peculiar to joint ownership and differentiates it from ownership in common. On this account personal property is rarely held jointly.

Review Questions

1. Define "personal property."
2. What are "choses in action"?
3. Is the right to sue for damages a property right?
4. Define "real property."
5. When are trees real property and when are they personal property?
6. What is the meaning of the term "fixtures"?
7. What are the tests used to determine whether fixtures are to be considered as real or personal property?
8. If a man leases a floor in a certain building and there uses machines which he screws to the floor, can he on the expiration of the lease take the machines with him? Give reasons for your answer.

9. Would your answer be any different if the machines had been affixed to the wall in such a way that their removal would necessitate a destruction of part of the wall?
10. What are the different ways of acquiring personal property by original title?
11. When is a finder entitled to lost property?
12. If stolen jewelry has been pawned, is the rightful owner entitled to reclaim it from the pawnbroker without paying any charges to the pawnbroker? Explain.
13. What are the different ways in which personal property may be acquired by derived title?
14. Explain the meaning of the term "accession."
15. Explain the meaning of the term "confusion."
16. Explain the difference between ownership in common and joint ownership.

CHAPTER LIII

TRANSFER OF TITLE TO PERSONAL PROPERTY

§ 504. By Gift.—The person who has the right or title to personal property has also a right to transfer it to anyone else. He may give it away if he wishes to do so. He may do this either by actually handing over the property, or by making out a bill of sale for it and handing that over to the person to whom he wants to give it. If the property is not easy to handle, it is not always necessary to actually hand over the property itself. Handing a person the keys to a building, or a savings bank book, or a bill of lading is equivalent to giving the person what is in the building, or the money on deposit, or the goods called for by the bill of lading. The giving of any means by which the recipient can obtain the property is sufficient.

Gifts may be made *causa mortis,* that is, to take effect in case of the giver's death. In this case, the gift to be valid must be made at a time when the giver is in actual expectation of death. If he recovers, such a gift is revoked and does not take effect. Gifts *causa mortis* may be made in any of the ways mentioned above.

§ 505. By Sale or Exchange.—The sale of personal property is a most important subject and has been treated at length in Chapters XVII–XXII.

§ 506. By Will.—Personal property bequeathed by will passes to the legatee named in the will upon the death of the testator (the maker of the will).

§ 507. By Operation of Law.—Personal property and real property also may be transferred without any act of the parties and purely by operation of law.

In bankruptcy the property of the bankrupt (except his exempt property) passes to the trustee elected by the creditors.

If a man dies without a will the distribution of his property is provided for by statute.

Also property may be transferred by a court judgment or by a judicial sale.

§ 508. Chattel Mortgage.—Personal property may be mortgaged as well as real estate. A chattel mortgage is, in effect, the sale of a chattel with the condition that if a debt or other obligation is paid by the party who makes the mortgage, the sale shall be void and the title shall return to the party who made the mortgage. Such a conditional transfer is often made to secure a debt or loan. It is usual for the party who makes the mortgage, called the "mortgagor," to retain possession of the property, and in order to protect the title of the person to whom the mortgage is made, it must be recorded in the usual office of registry for the county. The object of this record is to give notice to other people that the property is mortgaged. Unless this record is made, the person to whom it was mortgaged could not claim his rights in the property if it were sold again to an innocent third party who did not know of the mortgage. A chattel mortgage is good usually for one year, or other period stated in the local statute, but may be renewed when about to expire.

Any personal property that is actually in existence and is owned by the mortgagor at the time the mortgage is made can be mortgaged. A growing crop, an automobile, household furniture, or a stock of merchandise can be mortgaged.

Stocks of goods are often mortgaged; in such cases it is understood that the mortgagor may continue to sell from them and keep the stock replenished and apply the profits to paying off the mortgage debt. Although such mortgages are always valid as between the parties, in some jurisdictions they are

valid as against creditors only for the portion of the original goods remaining on hand at the time of the enforcement of the mortgage.

To All to whom these Presents shall come, Know Ye That Harry J. Thomas, of New Rochelle, N. Y., party of the first part, for securing the payment of the money hereinafter mentioned, and in consideration of the sum of Two Thousand Dollars duly paid by William H. Richards, of New York City, N. Y., party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents does grant, bargain and sell unto the said party of the second part, all fixtures and show cases, and all other goods and chattels mentioned in the schedule hereunto annexed, and now in the possession of myself at my store, 165 Orchard St., New Rochelle, N. Y.

To Have and to Hold, all and singular the goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, his executors, administrators and assigns for ever. And Harry J. Thomas, the said party of the first part, for his heirs, executors and administrators, all and singular the said goods and chattels above bargained and sold unto the said party of the second part, his heirs, executors, administrators and assigns, against Harry J. Thomas, the said party of the first part and against all and every person or persons whomsoever shall and will warrant, and for ever defend.

Upon Condition, that if Harry J. Thomas, the said party of the first part, shall and do well and truly pay unto the said party of the second part, his executors, administrators or assigns, the sum of Two Thousand and 00/00 ($2,000.00) Dollars within one (1) year from the date hereof, with interest at six (6%) percent per annum, which said sum and interest I, the said Harry J. Thomas, hereby covenant to pay, then these presents shall be void. And Harry J. Thomas, the said party of the first part, for his executors, administrators and assigns, do covenant and agree to and with the said party of the second part, his executors, administrators and assigns, that in case default shall be made in the payment of the said sum above mentioned, then it shall and may be lawful for, and Harry J. Thomas, the said party of the first part, does hereby authorize and empower the said party of the second part his executors, administrators and assigns, with the aid and assistance of any person or persons, to enter his dwelling-house, store, and other premises, and such other place or places as the said goods or chattels are or may be placed, and take and carry away the said goods or chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to retain and pay the said sum above mentioned, and all charges touching the same; rendering the overplus (if any) unto Harry J. Thomas, or to his executors, administrators or assigns. And until default be made in the payment of the said sum of money Harry J. Thomas is to remain and continue in the quiet and peaceable possession of the said goods and chattels, and the full and free enjoyment of the same. If from any cause said property shall fail to satisfy said debt, interest, costs and charges, the said Harry J. Thomas covenants and agrees to pay the deficiency.

In Witness Whereof, the said party of the first part, have hereunto set his hand and seal the fifth day of December, one thousand nine hundred and twenty-five.

Sealed and delivered in the presence of
Rose Goodwin

Harry J. Thomas [L.S.]

STATE OF NEW YORK
CITY OF NEW ROCHELLE } *ss.:*
COUNTY OF WESTCHESTER

On the fifth day of December, in the year one thousand nine hundred and twenty-five, before me personally came Harry J. Thomas, to me known, and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged that he executed the same.

NOTARY'S SEAL

Arthur Holmes
Notary Public.

The object of the chattel mortgage is to secure a debt or other obligation. Hence, the mortgagee's title to the property does not become absolute unless he forecloses the mortgage. It is usual to provide in the mortgage that if the debt is not paid the mortgagee may sell the property. If he does not sell, the mortgagor has a right to pay the debt and interest and redeem his property.

On page 383 is a form of chattel mortgage.

§ 509. Pledge.—A pledge is a transfer of the chattel as security for the payment of a debt or fulfilment of some other obligation. The subject of the "pledge" is discussed in §451.

Review Questions

1. What is necessary to constitute a gift?
2. What is a gift *causa mortis?*
3. Is it possible to make a gift of a debt?
4. How can it be done?
5. Why is one not allowed to revoke an executed gift?
6. What is a chattel mortgage?
7. Who retains possession of the mortgaged property?
8. Why should the mortgage be recorded?
9. Is it possible to mortgage property which has not yet come into existence?
10. After the mortgagor's default, what must the mortgagee do in order to obtain absolute title to the property?

Real Property

CHAPTER LIV

NATURE OF REAL PROPERTY

§ 510. Definition.—By real property is meant land and anything permanently attached to it.

Buildings and fences are regarded as part of the land, though they may become personal property if the owner of the land severs them from it. Things which grow of themselves or which remain year after year, such as trees, perennial plants, etc., are regarded as part of the realty, so long as they remain attached to it, but after they are cut down they become personal property. The same is true of stone, ice, etc.; after it is cut or quarried, it becomes personal property.

Crops which have to be planted every year and which are therefore the fruits of labor rather than of the land itself are personal property. A tenant has a right to those crops which he has planted himself if, when he planted them, he did not expect his lease to run out before they could be gathered. He has no right to fruit and perennial crops unless they have been gathered before he is notified to give up the land.

§ 511. Original Title.—The right to the ownership of real property was acquired in the first place by taking possession of it and keeping it. This is "title by occupancy." To a limited extent this right still exists in the western part of the United States, where unoccupied lands may be taken up by living on them for a certain length of time and filing a claim with the government.

Where property has been in open and undisturbed (continuous) possession of a party under a claim of right for a

certain length of time prescribed by law, generally about twenty years, and when his possession is undisputed by anyone, the possessor acquires a good title to it. This is termed "title by prescription."

§ 512. **Acquired Title.**—The ownership of property today is usually by title acquired from someone else. It is acquired either by deed, will, or inheritance. A deed or will involving real property must conform to the laws of the state where the real estate is located. When real property is left by will, it is said to be devised and the person who so receives it takes by devise.

Where a man dies leaving real property and without making a will, the law determines which of his relatives shall take the property. Their title is acquired by inheritance.

With some variations, the statutes usually provide for the following basis of inheritance. If the deceased leaves children, grandchildren, or great-grandchildren, they have the first right to the property. If a man dies without children, leaving his father surviving him, the father takes the real estate. If his father is dead, the property is divided between his mother, brothers, and sisters. Grandparents may take by inheritance if none of the relatives mentioned above are left surviving; or if grandparents are dead, uncles and aunts may inherit.

The rights of the relatives would be subject to the widow's right of dower or its equivalent. (See §515.)

§ 513. **Estates in Real Property.**—A person may own real property outright. This is termed an "estate in fee simple." Or he may possess the right to it for his own life or that of another. This last is called "an estate for life." Either of these estates in fee simple or for life is regarded as real property. Any other right to the possession of land is regarded as personal property, even though it may be a lease for a term of years much longer than anyone's life.

At common law a conveyance to A was considered as creating a life estate only. In order to create an "estate in fee simple" it was necessary to add the words, "and his heirs," i.e., "to A and to his heirs." This distinction has been abolished by statute in most states.

The holder of a life estate is bound to make such repairs as are necessary to prevent the property from falling into decay, but he is not bound to make improvements, or replace buildings destroyed through no fault of his, or pay the principal of any incumbrance, though he must pay the interest. On the other hand, he must do nothing to waste the estate, such as stripping it of timber or opening new mines upon it, though he may work opened mines and cut a moderate amount of timber.

§ 514. Remainders and Reversions.—After the life estate or life estates end, the final ownership of the property must either be given to someone else or revert to the original owner or his heirs. If the estate that is left is given to someone else, it is called "an estate in remainder"; if it comes back to the original owner, it is called a "reversion."

When the original owner is dead, the reversion comes back to his heirs. There may be remainders and reversions even after property has been leased for many years. Remainders and reversions involve the absolute ownership of property.

§ 515. Dower and Curtesy.—At common law a wife was entitled upon the death of her husband to a life estate in one-third of any real property which he owned during their marriage. This right was known as "dower."

If there was a child born alive the husband was entitled upon the death of the wife to a life estate, not in one-third but in the whole of the wife's real property. This right was known as "curtesy." Many states have abolished both dower and curtesy. In some states, however, a husband cannot transfer his real estate so as to cut off his wife's right of

dower unless she joins with him in the deed. In New Jersey each is given a life estate in one-third of the other's real property in place of dower or curtesy.

§ 516. **Easements.**—Easements are rights to make use of the land of another in some way, as by a right of way over the fields of one's neighbor, or the right to restrict another from erecting buildings which shut off light and air, or the right to have a drain-pipe under another's land. When these rights are included in a deed of property they follow the property deeded itself and will pass with it to any subsequent owners. For instance, a man might want to sell a lot in the middle of his farm. In order to make it salable he gives the purchaser a right of way over the rest of the farm between this lot and the highroad. This right of way, which was the inducement to the sale and is necessary to the enjoyment of the property sold, passes along with the property to the next owner. It is inseparably connected with the property and is regarded as a part of it, and hence considered real property.

If, however, a right of this sort is given by deed separately from the property, it belongs solely to the person to whom it is given and cannot be assigned to anyone else.

Mere oral permission to go across another's property, to pick apples from his trees, etc., is a license, and the owner may take it away at any time.

§ 517. **Joint Tenancies and Tenancies in Common.**—The word "tenancy" in legal parlance means ownership of estate in land. It is not limited to the renting of land, but means a holding for years or for life. Any estate in land may be owned by two or more persons at the same time. They hold it either in joint tenancy or tenancy in common, according to the deed or instrument from which they get their title.

In joint tenancy, on the death of one of the owners, the remaining owners take the property, the entire property going to the last survivor.

In tenancy in common, if one of the several tenants dies his heirs have a right to come in to share the ownership of the property with the remaining tenants.

Joint tenants or tenants in common may divide the property between them by agreement. If they cannot agree, they may bring what is known as a "partition action" and have the court divide the property between them.

§ 518. **Trusts.**—When one person holds property for the benefit of another, he is said to hold it in trust. The one who holds property is called a "trustee." The one for whom it is held is called the "beneficiary." A corporation formed for holding property as trustee is called a "trust company."

A person may hold any of these estates except dower and curtesy in trust for another or for several others. Some states do not allow trusts which would prevent creditors from enforcing their claims against the property, except for married women and children under age. Trusts to accumulate income for more than a limited period are also prohibited. Trusts for charitable purposes of more than a certain amount of a person's entire estate cannot be created by will in many states, if the person is survived by husband, wife or children.

If a person pays the price for land and another takes the title to it, unless a gift was intended, the person taking the title holds it in trust for the one who paid for it.

Review Questions

1. A man by his will left all his personal property to B and all his real property to C. Part of his estate was a farm on which there was growing corn at the time of his death. Who is entitled to the corn?
2. What is title by prescription?
3. What are the three ways in which title to real property may be acquired other than by prescription?
4. What is the meaning of "an estate in fee simple"?
5. What is a life estate?
6. What rights to real property are considered as personal property?

7. What are the duties of a holder of a life estate in regard to making repairs?
8. Define "estate in remainder."
9. Define "reversion."
10. Define the term "dower."
11. Define the term "curtesy."
12. Define "easement."
13. When does an easement pass with a transfer of the property?
14. Distinguish between joint tenancies and tenancies in common.
15. Define "trust."
16. What are some of the restrictions on the creation of a trust?

CHAPTER LV

TRANSFER OF REAL PROPERTY

§ 519. Conveyance of Real Property.—A sale of real property must always be carried out by means of a document called a "deed" signed by the seller. If signed by an agent, the agent should be authorized in writing to act for the seller and the authorization should be under seal.

The seller or vendor is designated as the "grantor" and the buyer as the "grantee."

The deed should contain a full and accurate description of the property: usually this is given by metes and bounds. The deed must be signed and acknowledged before a notary, justice of the peace, or a commissioner of deeds by the party giving the conveyance, and by the husband or wife of the party if the law of the state requires this formality in order to cut off dower, curtesy, or homestead rights.

To take effect, the deed must be delivered into the hands of the person to whom it is assigned or into the hands of an agent whom the assignee has authorized to receive it.

Tewksbury *v.* Tewksbury, 222 Mass. 595

The owner of real estate made a deed of the property and handed it to the grantee, his wife, who immediately returned it to him. The intention was that the grantor would retain control of the deed and the property and that the deed would not become operative until the grantor's death. In the administration of the grantor's estate, the validity of the deed had to be determined.

Held: The deed was ineffectual. The mere manual delivery of the deed was insufficient. An intention that the deed shall "operate as a present conveyance of title was essential."

§ 520. Quitclaim Deeds.—There are two kinds of deeds in general use—quitclaim and warranty. A quitclaim deed

merely releases any rights that the grantor has in the property, whatever these may be. The grantor virtually says, "I have not given a conveyance to anyone else and whatever right I have, if any, I give to you." Hence if it develops that the grantor never had any rights at all, nevertheless the grantee cannot reclaim any consideration paid, because he bought the possibility of rights rather than rights themselves.

But if the grantor had certain rights but had previously conveyed or incumbered them, then he is liable under the quitclaim deed.

The distinctive phraseology in the quitclaim deed is that the grantor "releases, and forever quitclaims," etc.

§ 521. **Warranty Deed.**—In the warranty deed, the seller, when conveying the property, warrants that the title is free from all defects and incumbrances that might disturb the purchaser in his enjoyment of the property and that he will protect the purchaser from any claims against the property and execute any further documents that may be necessary.

The distinctive wording used in the warranty deed is that the grantor "gives, grants, bargains, sells and conveys," etc.

The following is a form of warranty deed:

THIS INDENTURE, made the 21st day of January, nineteen hundred and twenty-six, between Arthur Elliott of Ithaca, New York, party of the first part, and Grant Allen of Oyster Bay, New York, party of the second part:

WITNESSETH, that the party of the first part, in consideration of Three Thousand Dollars ($3,000), lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, his heirs and assigns forever, all . . . .

(*Description of property*)

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises;

To have and to hold the premises herein granted unto the party of the second part, his heirs and assigns forever.

And said Arthur Elliott covenants as follows:

First—That said Arthur Elliott is seized of said premises in fee simple, and has good right to convey the same;

Second—That the party of the second part shall quietly enjoy the said premises;

Third—That the said premises are free from incumbrances;

Fourth—That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth—That said Arthur Elliott will forever warrant the title to said premises.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal the day and year above written.

In presence of: ARTHUR ELLIOTT [L.S.]
A. M. WYCKOFF

(*Notarial acknowledgment in due form.*)

§ 522. Record of Deeds.—A deed which has been delivered is good as between the two parties concerned, the seller and the purchaser of the property, but to make the purchaser's right good against all claims the deed must be recorded. It is usual for each county to have an office for the recording of all deeds affecting the real property located in that county.

It is of vital importance that a deed be recorded. If a deed is not recorded and the seller executes another deed which is filed, the holder of the first deed has no claim to the land. All he can do is to bring suit against the seller for damages.

§ 523. Restrictions in Deeds.—Restrictions in deeds are generally made for the benefit of the surrounding property. They are legal and binding so long as they are not against public policy; for instance, a restriction for the purpose of creating a monopoly or restricting competition would be illegal. Usually the restrictions relate to the character of buildings which may be erected in a certain locality.

If the restrictions are intended to benefit the surrounding property, any of the owners of that property may enforce them. They remain restrictions on the land even when it is transferred to another owner. An owner who violates the restrictions cannot plead that they do not appear in his deed.

Hibberd v. Edwards, 235 Pa. 454

D purchased a parcel of land affected by a restriction in a deed forbidding the erection on the land of "any tavern, drinking saloon, slaughterhouse, or any other building for offensive purpose or occu-

pation." D commenced the erection of a public garage on the property. P sought an injunction to prevent this.

Held: For P. A public garage comes within the restrictions as an offensive occupation.

§ 524. Searching Title.—A purchaser of property should always insist on a warranty deed for his own protection, unless the circumstances are such that he is willing to take the property at the risk of having further expense to protect his title. Any restrictions in earlier deeds continue to affect the land even in the hands of a later owner. The possibility of defects in the title of, or existing claims against, the property is also always present. Therefore, the purchaser of real estate should always have the title examined to make sure that his right is incontestable and that he is likely to remain in undisturbed possession.

This search may be most effectively made by one of the numerous companies whose business it is to examine such titles with a view to insuring their validity. As specialists in this complicated legal work they can quickly form a reliable opinion as to the validity of any title to property within a given locality. In many cases it is advisable to have the title guaranteed by some one of the title guaranty companies.

Review Questions

1. What should a deed contain?
2. What is meant by the requirement that the deed must be acknowledged?
3. When is it necessary that the husband or wife of the grantor join in the deed?
4. A man makes a deed in favor of X. He tells X that he has done this and also tells X that he has placed the deed in his desk but does not authorize X to take the deed from the desk. A few days before his death, the grantor tells his wife what he has done and directs her to remind X that the deed is his. Do these facts show a sufficient delivery to X?
5. Name the two classes of deeds. What are their differences?

6. Why is it important to record a deed?
7. What are restrictions in deeds?
8. Why is it desirable before buying real property to have a search of the title made?
9. By whom are such searches usually made?

CHAPTER LVI

MORTGAGES AND TENANCIES

§ 525. Mortgage of Real Property.—A mortgage of real property is given as security for the due payment of a note or, more generally, a bond. It is in form an instrument like a deed, assigning the property in question to the man who has loaned the money, but providing that if the money is repaid when due, the assignment shall be null and void. Sometimes an absolute deed of land is given to secure the payment of money; in such case the deed is in reality a mortgage and may be so proved.

The possession of the property remains in the hands of the mortgagor (the person who executes the mortgage), and the mortgagee (the person who loans the money) has the right to foreclose or take possession of the property if the mortgagor does not live up to his agreement.

§ 526. Form of Mortgage.—A mortgage is in form a deed of the property from the mortgagor to the mortgagee with a defeasance clause. If the conditions named in the deed are fulfilled it will become of no effect; if the conditions are not fulfilled, the mortgagee will have a right to foreclose. The mortgage should be under seal and should be recorded in the office for the registry of deeds in the county where the property is located. When paid, a satisfaction piece stating in simple terms that the mortgage has been paid and referring to the page of the record where it is recorded should be filed with it.

The following is the usual type of mortgage:

MORTGAGE

THIS MORTGAGE, made the 15th day of December, nineteen hundred and twenty-five, between Daniel H. Coler of Yonkers, New York, the mortgagor, and Charles Fenner of the same place, the mortgagee.

WITNESSETH, that to secure the payment of an indebtedness in the sum of Twelve Hundred Dollars, ($1,200), lawful money of the United States, to be paid on the 15th day of December, nineteen hundred and twenty-seven, with interest thereon to be computed from date, at the rate of six per centum (6%) per annum, and to be paid the mortgagee, according to a certain bond or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee . . .

(*Description of property*)

And the mortgagor covenants with the mortgagee as follows:

1. That the mortgagor will pay the indebtedness as hereinbefore provided.
2. That the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee.
3. That no building on the premises shall be removed or demolished without the consent of the mortgagee.
4. That the whole of said principal sum shall become due after default in the payment of any instalment of principal or of interest for thirty days, or after default in the payment of any tax, water rate, or assessment for ten days after notice and demand.
5. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.
6. That the mortgagor will pay all taxes, assessments, or water rates, and in default thereof, the mortgagee may pay the same, and all amounts so paid shall be added to the amount already secured by this mortgage.
7. That the mortgagor, within five days upon request in person or within ten days upon request by mail, shall furnish a statement of the amount due on this mortgage.
8. That notice and demand or request may be in writing and may be served in person or by mail.
9. That the mortgagor warrants the title to the premises.

IN WITNESS WHEREOF, this mortgage has been duly executed by the mortgagor.

In presence of: DANIEL H. COLER [L.S.]
ANNA B. TYLER

(*Notarial acknowledgment in due form.*)

§ 527. **Foreclosure.**—The term "foreclosing a mortgage" means the legal steps that are taken to sell the property and to apply the price realized to the payment of the debt. If more is realized by the sale than is necessary to pay off the mortgage, the interest due, and the expenses of the enforced proceedings, any surplus belongs to the mortgagor. If there is a deficit, the mortgagee may sue the mortgagor on the bond and collect what remains unpaid. Usually both bond and mortgage are sued on together.

Up to the time the property is sold the mortgagor has the right to redeem it from sale by paying the amount of the mortgage, the interest, and the expenses up to the time of the

foreclosure. This right of the mortgagor is termed his "equity of redemption."

If the property is transferred it remains subject to the mortgage, but the new owner, unless he assumes the mortgage, does not become responsible for the payment of any part of the debt which the price of the property on the sale fails to cover. The original mortgagor still remains responsible.

§ 528. Kinds of Mortgages.—

Deeds of Trust.—Mortgages may be given by a deed in trust to a third party as trustee. This is the usual rule with corporate mortgages. These are called "deeds of trust." The trustee has the right to foreclose. If he fails to exercise his right, a bondholder may bring foreclosure for the benefit of other bondholders on showing the court that the foreclosure is necessary to protect their interests and that the trustee refuses to take action.

Purchase Money Mortgages.—These are mortgages given for part or the whole of the purchase price of land. They take precedence of every other claim except for any taxes. It is not necessary for a wife to join in a purchase money mortgage in order to cut off her right of dower. The mortgage is attached to the property before it becomes the property of her husband, and she is entitled to dower only in what may remain to her husband after the mortgage on the property is paid off, or in his equity of redemption which will be his share of the purchase price of the land on foreclosure sale. The mortgage may be given either to the person from whom the land is bought, or to a third person.

Building and Loan Mortgages.—Building and loan mortgages are frequently given to secure funds for erecting a building. The money is paid over in instalments as the building reaches certain stages. Interest may be charged on each instalment only from the time it is paid over; but the mortgagee may deliver the whole amount to a trust company to be held and

paid over as the instalments fall due. Full interest may then be charged, deducting the amount which the trust company allows on the deposit.

§ 529. Classes of Tenancies.—The relation between landlord and tenant will be under one of these five tenancies:

1. Tenancy for Years.—This type of tenancy should be evidenced by a written lease; otherwise it will be unenforceable under the Statute of Frauds, as it is an agreement for more than a year.

2. Tenancy from Year to Year.—This tenancy runs for one year and at the end of the year it will be automatically renewed unless one of the parties has given the other proper notice of termination. At common law six months' notice was required, but in many states this has been cut down to sixty or even thirty days.

3. Tenancy from Month to Month.—This is the same as the year to year tenancy except that the time unit is a month and that thirty days notice is sufficient in all cases.

4. Tenancy at Will.—Here there is no definite time for termination and either party may bring it to an end whenever he pleases, except that in some states a notice of a prescribed period is fixed by statute. This tenancy may be created by the tenant's remaining in possession with the consent of the landlord after the end of a fixed term.

5. Tenancy by Sufferance.—This arises where a tenant who obtained possession lawfully remains in possession without the consent of the landlord. Such a tenant may be evicted by the landlord without notice.

§ 530. Tenant Remaining After Expiration of Tenancy.—If a tenant remains in possession of the premises after the expiration of his tenancy, the landlord may regard him as a trespasser and order him to leave and if necessary use all reasonable

force to evict him; or the landlord may permit him to remain as his tenant. In the latter case a new lease will usually be implied for the same period as the old one. But in some states the tenancy will simply be at will; and where the previous tenancy was for years, the implied renewal cannot, because of the Statute of Frauds, be for more than one year.

Haynes v. Aldrich, 133 N. Y. 287

P leased a house to D for one year; the lease ending May first. Contrary to the terms of the lease, D sublet the house to be used as a boarding house. Before the expiration of the lease, D informed P that she did not wish to renew. May first was a holiday. Possession was retained by the sub-tenant until May fourth, the excuse being that moving trucks were not procurable on the second and that a boarder was too ill to be moved with safety on the third. P sued D for rent, claiming a renewal for another year.

Held: For P. There was a voluntary holding over by the tenant which gave the landlord the right to hold the tenant for another year. The illness of the boarder was no excuse because this situation arose through a violation of the terms of the lease.

§ 531. **Expediency of Written Agreement.**—As pointed out above, a lease should be in writing if for a longer term than one year. Even when not required, a written lease is desirable as insurance against disputes and misunderstandings.

Many leases necessarily are long and involved, but the following will serve for ordinary cases:

LEASE

THIS AGREEMENT OF LEASE made this 8th day of December in the year 1925, between John K. Robinson of Yonkers, New York, and Henry Smith of Yonkers, New York.

WITNESSETH, that the said Robinson does demise unto the said Smith, all of that dwelling-house and land situate

(*full description*)

from the first day of February, 1926, for the term of three years next ensuing, the said lessee, Smith, to pay therefor during the said term the rent of Four Hundred and Fifty Dollars ($450) yearly, payable in equal monthly instalments of Thirty-Seven Dollars and Fifty Cents ($37.50) on the first day of each month, the first instalment to be paid on the first day of February next.

The said lessee covenants to pay the rent in the manner above stated;

that he will not assign without leave; that he will leave the premises in good repair, necessary wear and tear excepted; that the premises shall not be used during the said term for any other purpose or purposes than those above specified; that he will pay all bills for gas used upon the premises during the said term; that at the expiration of the said term, he will deliver to said lessor, his agents or assigns, quiet and peaceable possession of the said premises, and that the lessor may re-enter for default of ten days in the payment of any instalment of rent, or for the breach of any covenant herein contained.

Witness the following signatures and seals.

JOHN K. ROBINSON [L.S.]
HENRY SMITH [L.S.]

(*Notarial acknowledgment in due form.*)

§ 532. **Recording.**—It is usually provided by statute that the longer term leases shall be recorded in order to be binding on third parties. The period varies: in some states the statutory minimum is three years; in others five or seven years.

§ 533. **Subletting.**—The tenant has the right to sublet unless the lease forbids his doing so. Usually the landlord provides in the lease that the tenant may not sublet without his permission.

When there is a subletting, the original tenant remains responsible to the landlord for the payment of the rent and for the relinquishment of the property at the end of the term in as good condition as received with reasonable allowance for depreciation.

§ 534. **Rights of Tenant and Landlord Under Terms of Lease.**—If the tenant fails to pay rent or breaks any other agreement in the lease, the landlord may evict him. If the landlord accepts any of the rent due after the tenant has broken the lease in this manner, he cannot put him off the premises, but may bring suit to collect the remainder of rent or for damages.

If the landlord takes possession of a whole or part of the premises during the term of the lease, this is equal to eviction and is so called. Such procedure constitutes a breach of the lease on the landlord's part and the tenant need not thereafter pay rent. However, it may be provided (and the landlord usually sees that it is so provided in the lease) that the

landlord's dispossessing the tenant for non-payment of rent shall not constitute an eviction and that the landlord may relet the premises for the tenant's account, holding him liable for any deficiency.

If the landlord permits anything which renders the property uninhabitable, such as insufficient heat in an apartment house, this is termed a constructive eviction. The tenant has then the right to move out and refuse to pay any more rent; but if he remains he must pay. If the tenant supplies the heat himself or makes repairs which the landlord should have made under the lease, he may collect the money he has spent from the landlord.

The tenant has no right to utilize the resources of the property, except wood used to make necessary repairs. If there are developed mines on the land he may work them unless forbidden by the lease, but he has no right to open mines. He has a right to fruit, grass, etc., which ripens or is cut or picked before the lease runs out, and a right to any crops which he has planted himself if he has reason to expect that they will be ready to be gathered before the lease expires.

Review Questions

1. What is a mortgage?
2. Who has possession of the mortgaged property?
3. What is meant by a mortgage foreclosure?
4. Suppose A, the owner of real property, gives a mortgage to X. This mortgage is not recorded. Subsequently A gives a mortgage to Z. Z, not knowing anything about the earlier mortgage, has his mortgage recorded. Which mortgage would be the first mortgage in law?
5. What is meant by the term "equity of redemption"?
6. What effect has the transfer of real property on any outstanding mortgages?
7. Does the new owner become responsible for the mortgages?
8. What is a deed of trust?
9. What is a purchase money mortgage?
10. What is a building and loan mortgage?

11. When a tenant holds over at the expiration of the lease, what are the rights of the landlord?
12. What is the common law rule as to the rights of parties where the lease is from year to year?
13. Unless there is some special stipulation to the contrary, who has the duty of making repairs, the tenant or the landlord?
14. What effect does an eviction have on the liability of the tenant to pay rent?
15. What is a constructive eviction?
16. When is it necessary that the lease be written?
17. Does the tenant have the right to sublet the premises?
18. If a tenant does sublet the premises, is he relieved of his liabilities to the landlord?

Suretyship and Guaranty

CHAPTER LVII

CONTRACTS OF SURETYSHIP AND GUARANTY

§ 535. **Definition.**—The contract of suretyship or guaranty is a contract to be responsible for the debt, default, or miscarriage of another. There are two kinds of such agreements:

1. One is an agreement to be responsible personally if the debtor fails to pay; it may be enforced just as soon as the debt falls due and is not paid. This is the contract of suretyship proper.
2. The other is a guaranty that the other party will pay his obligations, and is called a contract of guaranty. In this case, the person, with whom the agreement is made must sue the debtor before he can collect from the surety.

The party assuming the responsibility is called the "surety" or "guarantor."

The party who is primarily liable is called the "principal debtor" or "obligor."

The party with whom the agreement is made is called the "creditor" or "obligee."

The party who indorses negotiable paper is not called a surety, though his responsibility is similar. An indorser's responsibility is governed by very different rules from those relating to sureties. (See §406.)

§ 536. **Nature of Contract.**—The contract of suretyship or guaranty is generally part of the original contract between the

parties, and usually consists of signing some paper, such as a bond or note, as surety or guarantor, along with the maker of the original obligation. If a man signs an executor's bond along with the executor, he becomes a surety for the faithful performance of the executor's duties.

The contract of guaranty is a separate agreement in the nature of an offer to be responsible for the extension of credit, or a separate contract written on the back of some other agreement. If you write to Paul Jones asking him to extend credit to John Doe, and stating that you will see him paid, or if you write "I guarantee the within contract" on the outside of a contract and sign your name, you thereby become a guarantor.

Many men have come to grief through careless willingness to become responsible for others. Long ago Solomon said: "A man void of understanding striketh hands and becometh surety in the presence of his friend." It is wrong for any man to become responsible for the financial mishaps of another unless he can afford to lose the money. When men who cannot afford to lose the money sign as sureties, they take chances they have no right to take. There is always a risk involved or the surety would not be demanded.

§ 537. **Written Contract.**—The contract of suretyship or guaranty must always be in writing in order to be enforced. It is one of the classes of contracts specified in the Statute of Frauds, i.e., a promise to answer for the debt, default, or miscarriage of another. (See § 65.)

If a person agrees to pay outright for something to be done for another, or goods to be delivered to another, this is not a contract of suretyship and need not be written. For instance, if John Brown tells a grocer to deliver groceries to James Smith and he will pay for them, this is not a contract of suretyship or guaranty, but an outright agreement to pay

on the part of John Brown—and the charge should be against Brown and not against Smith. But if Brown should write to the grocer, "If you will sell groceries on credit to Smith, I will pay for them if he does not," this is a contract of guaranty and must be in writing. Brown is promising to pay only in event that Smith does not.

In the first case the original charge on the grocer's book should be against Brown who bought them for Smith.

In the second case the goods are charged to Smith and Brown has no responsibility unless Smith fails to pay.

The following is a form of letter guaranty:

Chicago, Illinois,
January 15, 1926.

Todd & Co.,
Terre Haute, Indiana.

Gentlemen:

In consideration of your hereafter giving credit to Thomas J. Allen from time to time in the course of his business as retail grocer in Terre Haute, Indiana, I do hereby undertake and guarantee the payment of any sums for which the said Thomas J. Allen may become indebted to you, but not to exceed $2,000.

This instrument is intended as a general, unlimited, continuing guaranty, whereby I undertake and guarantee as a primary liability upon me, any and all balance of indebtedness due you from Thomas J. Allen or that may hereafter become due, and any contract entered into by Thomas J. Allen and Todd & Co., creating or extending such indebtedness, or changing the form thereof, shall be binding upon me, without notice, and render me liable under this guaranty.

James S. Martin

§ 538. **Parties.**—There are, as previously stated, three parties to a contract of suretyship or guaranty—the creditor or obligee; principal debtor or obligor; and the surety or guarantor.

The surety or guarantor must be competent to contract. He is the one who incurs responsibility under the contract; hence, it is essential that he be competent to bind himself. (The reason for requiring security may have been because the principal was not competent to contract.) The promise to be responsible for the debt of the obligor must be made direct to the obligee or the surety will not be a party to the contract.

Signing a note or paper as surety is, however, a sufficient promise to the obligee.

§ 539. **Consideration.**—The contract of the obligee with the principal debtor or obligor is the consideration for the surety's promise. If it is a contract of guaranty, the consideration is the giving of credit to the principal debtor. If a bond or note, it is the furnishing of the money for which the bond or note was given. In the case of a bond for the faithful performance of the duties of an officer, the enjoyment of the office is the consideration, or in the case of a bail bond the freedom of the prisoner is the consideration for the agreement of the surety.

If the credit has been given to the principal debtor *before* the contract with the surety or guarantor, there is no consideration for this second contract and the surety or guarantor is not bound. In such a situation, to make a valid contract and hold the surety or guarantor, the creditor or obligee must pay the surety something, remit something to the obligor, or extend the time of payment, so that there may be a good consideration for the agreement of the surety or guarantor.

§ 540. **Delivery and Acceptance.**—A bond, note, or paper of similar nature, which is indorsed or guaranteed, must be delivered to the obligee and accepted by him before it becomes a contract and the surety or guarantor becomes liable on it. Simply receiving the paper, however, without any comment, is a sufficient acceptance.

In a contract of guaranty, the creditor must notify the guarantor that he accepts his offer and will extend the credit asked for in reliance on his guaranty. Even where the creditor himself asks for the guaranty, he must still notify the guarantor that credit has been extended.

If the guaranty is for sales during a certain period of time, such as a year, the creditor should notify the guarantor

at once that he has granted the credit, and at the end of the period he should notify the guarantor again of the amount of credit he has granted during the year.

Review Questions

1. What is a contract of suretyship?
2. What is a contract of guaranty?
3. What is the difference between the two contracts?
4. How do the liabilities of a surety differ from the liabilities of an indorser of negotiable paper?
5. Is consideration necessary for contracts of guaranty and suretyship?
6. Give illustrations of consideration in such contracts.
7. Is it necessary that the contract of guaranty be in writing?
8. May a minor properly be a surety?
9. Would a corporation ordinarily have the power to assume the obligations of a surety?
10. What is the usual consideration for the surety's promise?
11. What is the usual consideration for the guarantor's promise?
12. A is indebted to B and is unable to pay his debt. When the debt has been overdue for some time, A induces his friend X to sign a guaranty of the debt. Is X liable on this guaranty?
13. Would it make any difference if B in return for the guaranty had agreed to withdraw legal proceedings that he had already instituted?
14. Is it necessary that the creditor's acceptance of an offer of a guaranty be communicated to the guarantor?

CHAPTER LVIII

RIGHTS OF SURETY OR GUARANTOR

§ 541. **Notice.**—A surety is not entitled to notice of the failure of the obligor to pay the debt or perform his duty before the obligee may sue him and hold him liable. If the debt is not paid, or the prisoner on bail escapes, or the cashier absconds with the funds, the surety is liable at once. This is because a surety is equally liable with the original obligor.

A guarantor, on the other hand, must be given notice of the failure of the person to perform what he has guaranteed. The creditor, or obligee, must also, where the contract is one of guaranty, enforce any security which he may have and try to collect from the obligor before he turns to the guarantor to collect what still remains due. In the case of negotiable instruments with indorsement, the indorser differs from a surety in that there must be demand of payment and notice that it has been refused, in order to hold him liable.

§ 542. **Reimbursement.**—After a surety has paid the debt, he is entitled to turn around and collect it, if he can, from the obligor, who had incurred the original obligation. Instead of paying the debt the surety may, if he chooses, apply to a court of equity to compel the obligor to pay it, and to have any security which the obligor may have given to secure the debt sold to pay it. He is then liable only if the obligor is absolutely unable to pay and any existing security does not sell for enough to satisfy the debt.

If the creditor releases the obligor from payment, he releases the surety also. If, however, at the time he releases the debtor, the creditor states that he reserves his right against the surety, and so notifies the surety, the surety remains liable,

but after the surety has paid the debt he may collect it himself from the principal. The same is true with respect to the guarantor.

§ 543. **Extension of Time.**—Merely extending the time to pay a debt without receiving any new consideration for it will not release the surety or guarantor, because the agreement to extend the time in such case could not be enforced. But a valid extension, based on a consideration, would release a surety or guarantor.

§ 544. **Subrogation.**—In addition to his right to recover from the original debtor anything he has paid on the contract, the surety has the right to be put in the creditor's place, so far as remedies against the debtor are concerned; that is, he is entitled to all the creditor's rights against him, including the right to enforce any security for the payment of the debt. This is styled the "right of subrogation."

If the creditor gives up any security without the surety's consent, to that extent he releases the surety from his obligation. For instance, if the creditor has a mortgage as security for the payment of the debt, and releases part of the land subject to the mortgage, he will be entitled to collect from the surety only the amount of the debt less what the land so released was worth.

A surety must usually pay the debt in full before he can demand to be put in the creditor's place.

The same rules apply to the guarantor.

§ 545. **Contribution.**—A cosurety is one who is equally bound with another for the debt, default, or miscarriage. Usually both sureties sign the same instrument at the same time, but this is not essential.

If there are other cosureties under the contract, the surety who pays the debt is entitled to recover from each of them a proportionate part of what he has paid. The creditor may not

release any of them without securing the consent of all the others. If he does so, it will have the same effect as releasing any part of the security and will discharge the obligation of the remainder of the cosureties to that extent.

These principles also apply to co-guarantors.

§ 546. **Defenses.**—If, because of some defect in the contract, the creditor cannot enforce it against the debtor, he cannot enforce it against the surety or guarantor either. This statement does not apply where the creditor cannot enforce the contract because the debtor was under age, or insane, or suffering under some disability which by law made him incapable of contracting. In such a case the very reason for having a surety or guarantor was to protect the creditor from loss through such disability and the surety is not released.

Any fraud perpetrated on either the principal debtor or the surety or the guarantor would be a good defense to an action to enforce the contract against the surety or the guarantor.

§ 547. **Discharge.**—The surety can be held to the contract only as he made it. If the creditor and the principal debtor agree to make any change in it, they must get the surety's consent or he will cease to be liable. If the surety is not released by delay in collection, the orginal contract stands. If the surety wants to prevent the delay, he must notify the creditor to enforce payment or must himself bring suit to do so. These rules apply likewise to the guarantor.

If the creditor releases the principal debtor or any of the security given by him for the payment of the debt, he loses his rights against the surety or guarantor to that extent, as has been explained in § 542.

A surety on a bond for the faithful performance of the duties of some responsible position, will be released from liability, if the employer keeps the person holding it in his employ after he has discovered any dishonesty in his dealings.

Before any credit has been extended in reliance on his

promise, a guarantor may give notice to the person from whom he has requested credit that he has changed his mind and refuses to be liable for the party for whom he asked the credit. He cannot thereafter be held responsible for any credit which may be extended.

Death.—If the obligor dies before he has entered upon the official duties for which a bond was given, or before he has received any money or taken advantage of any credit to which he was entitled under the agreement, there is, of course, nothing to hold the surety for. After the principal obligor has incurred any liability under the agreement, the surety becomes liable and remains so even in case of the principal obligor's death.

If the surety himself dies, his obligation is not discharged but his estate still remains liable on the contract. It must be enforced against the other sureties first, however. After the death of a guarantor, no further credit may be extended in reliance on his guaranty, but his estate remains liable for what has already been given.

Review Questions

1. Is the surety entitled to notice of the default of the obligor?
2. Is the guarantor entitled to notice of the default of the obligor?
3. In the case of a guaranty, what steps may the creditor be obliged to take before proceeding against the guarantor?
4. A is a surety for X on X's debt. A pays the debt before any demand has been made on X either by A or by the creditor. Is A entitled to be reimbursed by X?
5. A is the guarantor of B's debt to C. C gives B a release. What effect, if any, does this have on A's obligation? Why?
6. In the last case, if C had agreed to extend B's time, would such a promise on C's part have any effect on A's obligation?
7. Explain the surety's right of subrogation.
8. A, B, and C are sureties on X's bond for $50,000. On X's default, A pays $40,000, B $10,000, and C nothing. What are the rights of A and B in the matter?

9. Is it a rule that the surety may take advantage of any defenses that might be raised by the debtor?
10. If the creditor and the principal debtor without the consent of the surety alter the contract for which the surety has become liable, does such an alteration have any effect on the obligation of the surety? Explain.
11. What effect does the death of the obligor have upon his contract?
12. What effect does the death of the surety have upon his contract?

Bankruptcy

CHAPTER LIX

ENFORCING PAYMENT OF DEBTS

§ 548. When the Creditor Has Some Security for the Debt.—Security may be in the form of a mortgage on land or on personal property, or it may consist of a statutory lien, or of a right to reclaim property under a contract of conditional sale.

If the security is a mortgage, and the debtor has neglected or definitely refused to make the payments agreed upon, the proper course is to foreclose. Should the mortgage provide that on default the holder may sell the property, a foreclosure proceeding is still necessary. In order to give a clear title, the suit to foreclose must be brought and all legal formalities complied with before the property is sold.

Where there is a lien of any kind on property, such as an artisan's lien for services, the statutes which provide for the safeguarding of this class of claims also provide a method of collecting them. Common carriers have a lien for the freight upon goods carried; warehousemen upon the goods stored, for storage charges; tailors have liens on the suits made up from cloth given them; and carpenters upon the finished product of their labor; etc. The statutes bearing upon each case should be examined and the method of enforcement strictly followed, keeping in mind that the lien laws of each state vary in kind, number, and procedure.

§ 549. Where There Is No Security for the Debt.—If a debt is unsecured, it is necessary to bring suit and to get a judgment against the debtor before the court will grant an

execution, i.e., an enforcement of the judgment. An execution takes the form of an attachment and a sale by the sheriff of the debtor's property, advertised in the manner required by law. Household furniture, up to a certain amount (e.g., $250 in New York) and the tools used in following a trade are generally exempt from seizure. The articles thus exempted are more definitely enumerated by the statute covering this matter and vary in each state.

No proceedings for the collections of debts are satisfactory. If they are harsh, poor people are oppressed; if lenient, dishonest people defraud those who trust them.

§ 550. **Attempts to Defraud Creditors.**—In the case of fraud, the law generally allows execution against the person of the debtor, i.e., arrest and imprisonment. If there is reason to believe that the debtor intends to escape or to convey his property out of the jurisdiction of the court, the first step in the action to collect the debt should be an application for an order of arrest. The debtor must then give bond or go to prison.

Where a debtor has conveyed or assigned property with intent to defraud any of his creditors, the defrauded creditor may apply to the court to set aside the transfer. A common form of such fraud is seen where a man who is insolvent transfers the greater part of his property to his wife.

In many states the laws against fraudulent debt are not so severe and are difficult to enforce. It is probable that more money is lost by fraudulent debts than by all the forms of outright theft combined.

§ 551. **Bankruptcy.**—Bankruptcy is fatal to a business. Bankruptcy means that a man or a business has been adjudged by a court to be a bankrupt and that control of the business has been put into the hands of a trustee or receiver appointed by the court, to make such disposition of it as may be for the best interests of the creditors.

The bankruptcy laws are enactments of Congress designed to afford a means of distributing fairly among creditors the assets of a failing business. Before these were adopted the laws relating to the collection of debts differed in each state and when a business house failed there was strenuous competition among its creditors to see who could save himself, and much fraud and unfairness resulted. These local abuses have been done away with by the passage of national laws which are administered by the federal courts, and the result is better for both creditors and debtors.

The great advantage to the debtor is that if he has been only unfortunate and not guilty of any fraud, he may after the settlement of his affairs obtain a discharge from his past debts and start afresh to build up a new credit, with the assurance that as soon as he gets a little money it will not be taken from him on some old claim.

The advantage to the creditor is that all fare alike, and no one is preferred in his claims. The proceedings also give pause and opportunity to make a compromise to the advantage of all parties.

Review Questions

1. How is payment of a mortgage enforced?
2. What is a lien?
3. How is a lien enforced?
4. What is the procedure for collecting a debt for which the creditor holds no security?
5. What is meant by "exempt property"?
6. When is it permissible to arrest a debtor?
7. Under what circumstances may a transfer of property by a debtor be set aside?
8. What is the common form of such a transfer?
9. What are the objects of the bankruptcy law?

CHAPTER LX

VOLUNTARY AND INVOLUNTARY BANKRUPTCY

§ 552. Voluntary Bankruptcy.—Any person may file a bankruptcy petition on his own initiative asking the court to adjudge him a bankrupt. The privilege is also extended to partnerships, unincorporated associations and corporations in general. It does not extend, however, to municipal, railroad, insurance and banking corporations; when such corporations become insolvent, their affairs are administered under special laws. It is immaterial how small the amount the person may owe when he makes his application. But it is not usual for anyone to make voluntary application unless he is heavily insolvent and is being pressed by creditors. Under such circumstances, it is sometimes better for a person, when he can see no other way out, to anticipate his creditors and by so doing to end suspense and unavailing struggles to stave off the inevitable.

To go into voluntary bankruptcy, the debtor files a petition in the federal court for his district, stating that he is unable to pay his debts and asking that he be adjudged a bankrupt. With the petition he also files schedules stating the names and addresses of his creditors and the amounts due them and giving a description of his assets and their value. The creditors are then served with notice and with copies of the petition, and the further proceedings are the same as in cases of involuntary bankruptcy.

§ 553. Assignment for the Benefit of Creditors.—An insolvent debtor may assign his property to someone for the benefit of his creditors, instead of going into bankruptcy. The proceedings which must be taken in making an assignment for the benefit of creditors are prescribed by the state laws. The

reason that this is not often done is that when such an assignment is made, any one of his creditors may commence proceedings in bankruptcy, and then the whole matter must be settled in the bankruptcy court. Besides, in assignment proceedings the debtor cannot secure a discharge from his debts.

§ 554. **Involuntary Bankruptcy.**—In many cases a man is unwilling to become a bankrupt and is forced into bankruptcy by his creditors. This is called an "involuntary bankruptcy." It is commenced by the creditors filing a petition asking that the debtor be declared a bankrupt. This petition must set forth the following points:

1. That the debtor owes at least $1,000.
2. That the debtor is insolvent.
3. That the debtor has committed an act of bankruptcy.
4. That the act of bankruptcy was committed within four months of the filing of the petition, except in the case of fraud, as to which there is no fixed time limit.

The creditors, of course, must be prepared to prove all these points.

§ 555. **Persons Who May Bring Bankruptcy Proceedings.**—Bankruptcy proceedings may be brought by any one or more creditors to whom the alleged bankrupt owes not less than $500, if the total number of creditors is less than twelve. If there are twelve or more creditors, three or more must join in bringing the proceedings and their claims must aggregate more than $500.

Creditors who have received preferences may not be petitioning creditors; nor may secured creditors, except as to the unsecured portions of their claims.

§ 556. **Persons Who May Be Made Involuntary Bankrupts.**—Bankruptcy proceedings may be brought against any natural person, except a wage-earner or a person engaged chiefly in

farming, against any unincorporated association, any "express trust" and any corporation owing debts to the amount of $1,000 or over, except a municipal, a railroad, an insurance or a banking corporation. A municipal corporation, a railroad, an insurance company, or a bank cannot be thrown into bankruptcy for reasons of public policy. Whenever any such corporation becomes insolvent, the creditors may apply to a court of equity for the appointment of a receiver to wind up the business.

§ 557. **Acts of Bankruptcy.**—One of the requisites of the involuntary proceeding is conduct on the part of the bankrupt indicative of an insolvent condition. Such conduct is technically known as "an act of bankruptcy." The Bankruptcy Law enumerates the following as acts of bankruptcy:

1. To convey, transfer, conceal, or remove, or to permit to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors or any of them.
2. To transfer while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors.
3. To suffer or to permit, while insolvent, any creditor to obtain a preference through legal proceedings, and not have vacated or discharged such preference at least five days before a sale or final disposition of any property affected by such preference.
4. To suffer or to permit while insolvent any creditor to obtain through legal proceedings any levy, attachment, judgment or other lien, and not have vacated or discharged it within thirty (30) days.
5. To make a general assignment for the benefit of his creditors, or while insolvent to have a receiver or trustee appointed or put in charge of his property.
6. To have admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

The first act is a fraudulent transfer of the debtor's property, not necessarily to a creditor but to anybody. Usually such a transfer is to a relative or friend whom the debtor can trust to return the property after his creditors have quieted down.

The second act is a preferential transfer to a creditor. For example, an insolvent debtor singles out a large creditor and pays him 50 per cent of his claim, thereby using up the greater part of his assets and leaving little for the rest of the creditors. At their expense the large creditor has been preferred, i.e., secured a larger percentage of his claim than any equal distribution of the assets would give him. The test here is the effect and not the intent. So an insolvent, who pays an annoying creditor whom he detests just to get rid of him, might not desire to prefer him, but legally he would be doing so, and thereby committing the second act of bankruptcy.

On the other hand, if he refuse to pay and the creditor obtains an attachment, levy, judgment or other lien or judicial preference, which is not vacated or discharged within the periods provided, the debtor commits the third or fourth act of bankruptcy, as the case may be. So he is between the devil and the deep sea.

In re Minard, 156 Fed. 377

A petition to declare M a bankrupt was contested on the ground that he had not committed an act of bankruptcy. It was shown that M within a period of a few days before the filing of the bankruptcy petition had sold and transferred practically all of his property for considerable sums of money none of which he had or could account for when examined in the bankruptcy proceedings.

Held: This evidence was sufficient to show a fraudulent transfer.

In re Stovall Grocery Co., 161 Fed. 882

In a bankruptcy proceeding it was claimed that two acts of bankruptcy had been committed by the debtor firm: (1) a payment of $3 in full payment of the claim of a creditor; (2) a transfer by one member of the firm of his individual property but with intent to defraud firm creditors.

Held: The payment of a $3 claim would not, in a business of any

size, be an act of bankruptcy. The transfer by an individual member of a firm of his own property, even though with intent to injure firm creditors, is not an act of bankruptcy by the firm, because it is an individual and not a firm act.

The fifth act of bankruptcy covers two situations: a general assignment for the benefit of creditors, and a receivership based on insolvency. The purpose of both of these proceedings is to secure relief from the harassment of pressing debtors without going into bankruptcy. But this object is often frustrated because the creditors may file a petition in bankruptcy based on such an assignment or receivership as an act of bankruptcy.

The sixth act of bankruptcy consists of a voluntary admission of insolvency and of willingness to be placed in bankruptcy. Any debtor who makes such a statement should of course be amenable to the bankruptcy laws.

Review Questions

1. What is the procedure in voluntary bankruptcy?
2. What is meant by an assignment for the benefit of creditors?
3. What laws govern such a proceeding?
4. What must be shown in a petition for involuntary bankruptcy?
5. What are the differences between the first and second acts of bankruptcy?
6. If a merchant is unable to pay his debts and his creditors desire to put him into bankruptcy can he keep out?

CHAPTER LXI

BANKRUPTCY PROCEEDINGS

§ 558. How Bankruptcy Proceedings Are Instituted.—In bringing bankruptcy proceedings, a petition is filed by the creditor or the creditors (as the case may be) in the federal court located in the judicial district where the bankrupt resides or has his place of business, or in a district where any property belonging to the bankrupt is located. A copy must be served on the bankrupt. The petition usually asks for the appointment of a receiver to protect the property until a trustee can be elected. The receiver is appointed by the court and is given charge of the bankrupt's property until the first meeting of creditors is called.

Most of the proceedings in bankruptcy, however, are conducted before a referee in bankruptcy appointed by the court. If the bankrupt defends the proceedings, it will be necessary to have a jury trial before the court can pronounce him a bankrupt. In most cases, however, the alleged bankrupt makes no defense and the court, after the expiration of the time allowed the debtor for making his reply, enters a decree adjudging him a bankrupt.

The bankrupt is then required to file a list of all the claims against him. The creditors should proceed to prove their claims. This is done by filing what is called a "proof of claim." It consists of an affidavit by the creditor stating the nature and the amount of the claim that is due and owing, and what security, if any, he has for it. If it consists of a promissory note, or a written instrument, he must file the instrument with the affidavit, although with the permission of the referee he may file a copy. Every claim will be allowed as a matter of course if it is proper in form and nature, unless an objec-

tion is made by some other creditor or by the bankrupt. Then the referee will hold a hearing and decide the validity of the claim. A meeting of all creditors whose claims have been allowed is called, and they elect a trustee to take charge of the property. The trustee must be elected both by a majority of all the creditors whose claims have been allowed, and by those holding a majority in amount of the claims.

The creditors may require the bankrupt to submit to an examination as to his property and any other matters pertinent to the bankruptcy proceedings.

§ 559. **Composition With Creditors.**—Very frequently the debtor offers to compromise for so many cents on the dollar; if his offer is a fair one, it is usually better for the creditors to take it than to go through with the long and costly procedure in bankruptcy. If accepted, the compromise is called a "composition."

Any creditor who thinks that the bankrupt is not offering enough may offer to take over the stock himself and to pay the other creditors a higher dividend. This usually brings a higher offer from the bankrupt if he is trying to defraud his creditors. The creditor making the offer must also pay the expenses of the proceeding up to the time the compromise is made.

§ 560. **Rights and Duties of Receiver.**—The receiver, appointed temporarily in bankruptcy proceedings to preserve the property until a trustee can be elected, does not conduct the business, but merely takes care of the goods, pays taxes and other dues, and hires a caretaker if necessary to look after the premises during the interim between the commencement of the action and the election of the trustee. If there are any goods in stock which are of a perishable nature or would soon go out of style and become unsalable, the receiver may, with the court's permission, sell these and deposit the money realized

in a bank to await the election of a trustee. It is the receiver's duty, however, to apply to the court for such permission.

He must give a bond for the faithful performance of his duties, and is entitled to fees based on a percentage of the amount of property handled.

§ 561. Rights and Duties of Trustee.—The trustee must give a bond, the amount of which is fixed by the creditors at their meeting, or if they fail to do so, by the court. The creditors may at any time require that this bond be increased. The bond must have two sureties. The trustee is responsible only for his own misdeeds, not for anything which the bankrupt does.

The trustee's first duty on his appointment is to get together all the property of the bankrupt, to collect any debts owing to him, by suit if necessary, to recover any voidable preferences (see §562), and to turn everything into money in the quickest manner possible, without unduly sacrificing the assets. As a general rule, if the property of the bankrupt is in the form of a business, it is necessary to keep the business running for some time in order to realize as much as possible. This, however, should not be done without an order of the court.

It is the trustee's duty to sell the property for the best price he can obtain. The trustee must dispose of all leases, and everything else owned by the bankrupt, except the property exempted from the claims of creditors by the state laws.

From the receipts he should pay the creditors, taxes due, cost of preserving the estate, filing fees, court costs, an attorney's fee, and wages due. Servants and employees for three months prior to proceedings are entitled to be paid before other claims are settled. Then he should discharge any secured debts, to the value of the security.

If after paying these items there remains enough to pay 5 per cent of the total amount of all the other claims, the

creditors are entitled to have a dividend declared within thirty days after the debtor has been adjudicated a bankrupt. If not, they must wait until the trustee has collected a sufficient amount.

Afterwards the creditors are entitled to have dividends declared from time to time until the entire amount of all the property in the trustee's hands has been paid out.

When he has distributed the final dividend, the trustee makes up his accounts and presents them to the court asking a discharge. He is then entitled to fees based on the value of the property which has gone through his hands.

§ 562. Voidable Preferences.—Any transfer of the debtor's property while insolvent and within four months of the filing of the petition in bankruptcy is a preferential transfer and consequently an act of bankruptcy. (See § 557.) The reason, of course, is that such a transfer offends the theory of equal distribution to creditors upon which the bankruptcy law is based. However, this theory is not carried to the extent of forcing every creditor who had received such a preference to return the property or money received to the trustee, because doing so would penalize energetic and entirely innocent creditors who had succeeded in collecting their debts.

But the bankruptcy law provides that a preference may be recovered from a creditor who at the time of the preferential transfer knew or had reason to know that he was obtaining a preference, i.e., that the debtor was insolvent, so that he (the creditor) was obtaining payment at the expense of the other creditors.

It is the duty of the trustee to endeavor to set aside and recover all such voidable preferences where there is a reasonable chance of success. As a practical matter it is often difficult to prove that the creditor had knowledge of the debtor's insolvency at the time of the preferential transaction.

If a creditor has received a preference, and afterwards in

good faith extends further credit to the debtor without taking any security, the amount of such further credit which is unpaid at the time of the bankruptcy is a proper set off against the amount of the preferential transfer.

Wright *v.* William Skinner, 162 Fed. 315

P, trustee of a bankrupt, sued D for the return of $4,000 paid by the bankrupt to D the day before the bankruptcy petition was filed. D admitted that at the time of the payment he knew that the debtor was hard pressed and without credit and that he had himself been persistently pressing his own claim for several months.

Held: For P. D at the time of the payment knew or should have known that he was receiving a preference over the other creditors.

§ 563. Rights and Duties of Bankrupts in Bankruptcy Proceedings.—It is the duty of the bankrupt to submit to examination if his creditors require it, to hand over to the trustee in bankruptcy all property in his possession, with the exception of what he is entitled to claim as exempt, and to give full information of all his affairs in order to aid the trustee in straightening out matters.

The bankrupt may offer to compromise the claims against him by paying a certain amount on the dollar. If a majority of his creditors, who also hold a majority in amount of the claims against him, sign a written consent to the compromise and the court approves it, the claims will then be compromised and the bankruptcy proceedings dismissed. Where a compromise is arranged, the bankrupt must pay the expenses of the proceedings up to the time of the arrangement. When a compromise is carried out, it has the same effect as a discharge; that is, the bankrupt is released on all dischargeable debts.

A bankrupt cannot be subjected to arrest for any claim involved in the bankruptcy proceeding, except for contempt of the court having charge of the proceeding or for attempting to escape from its jurisdiction so as to avoid an examination. He is entitled to claim as exempt such property as the state

law allows him. This usually consists of necessary household furniture and wearing apparel and such tools as are necessary for carrying on a trade.

When the bankrupt has given an honest account of all his debts and belongings, and has done all in his power to aid the proceedings, he is entitled to a discharge. This relieves him of the legal obligation to pay in full any of the debts which were included in the proceedings in bankruptcy. He cannot be proceeded against at law unless he subsequently acknowledges in writing that such debts are still due and owing. But the moral obligation to pay them still remains, and if at any future time he finds himself able, he should feel in honor bound to pay the remaining amounts due.

The bankrupt should apply for his discharge within a year after filing his petition, as this is the normal time limit permitted by the statute, although the Court is given discretion to extend the time where good cause is shown, but such power will be exercised only in exceptional cases.
in concealing property which ought to have been given up for the benefit of creditors, any of the defrauded creditors may come in within one year after a discharge has been granted and have it revoked.

§ 564. **What Debts Remain Undischarged.**—After a discharge in bankruptcy, the bankrupt still remains under obligation to pay any debts which were not due at the time of the discharge. He would be liable for rent on a lease not yet expired which fell due after the discharge in bankruptcy. It is the trustee's duty to sell such a lease if possible, but the bankrupt remains liable to the landlord in case the purchaser fails to pay.

The bankrupt should take care to include all debts due in the list which he files, because any debts not mentioned there remain valid claims against him after his discharge. Of course, if the creditors come in themselves and prove their

claims in the proceedings, the bankrupt is no longer liable for them.

There are certain claims which the law provides that a proceeding in bankruptcy shall not discharge. It does not cover taxes, nor the duty to support wife and children. Nor does it release the bankrupt from claims against him because of injuries to other people or because of fraud or wrongful acts. If a bankrupt's wife has divorced him, it does not release him from his duty to pay alimony.

Review Questions

1. What is the procedure if the person against whom the bankruptcy petition has been filed puts in a defense?
2. What is meant by "proving claims"? How is it done?
3. Who decides on the validity of disputed claims?
4. How is the trustee selected?
5. What is the object of examining the bankrupt?
6. What do the creditors gain by accepting a compromise?
7. Who is the receiver? How is he appointed? What are his duties?
8. What are the duties of the trustee?
9. When are the creditors entitled to a dividend?
10. What is the effect of the acceptance of a compromise by the required number of creditors?
11. What immunities are given to the bankrupt during the proceeding?
12. What is a discharge in bankruptcy?
13. What is its effect?
14. What debts are not affected by a discharge?

APPENDIX

CASES

The cases that follow are digested from actual court decisions. As the citations are given, the ambitious university student who has access to a library can read the decisions in full.

The student should study and analyze the statement of facts carefully so that he may determine the issues in the case. These issues will be the basis of classroom discussion. However, this discussion should be amplified and diversified by considering various hypothetical variations of the facts stated. In order to avoid the appearance of trying to limit such discussion, the authors so far as possible have refrained from asking precise questions and have simply given a general statement of the facts involved in the case.

CONTRACTS

1. Minneapolis & St. Louis Ry. Co. *v.* Columbus Rolling Mill, 119 U. S. 149; 30 Law. Ed. 376

On December 8, the mill offered to sell to the railroad from 2,000 to 5,000 tons of iron rails on specified terms, provided an acceptance was sent in by December 20. On December 16, the railroad mailed an order for 1,200 tons. This was declined by the mill on the 18th. On the 19th the railroad company sent in an order for 2,000 tons. As the mill refused to fill this order, the railroad company sued for damages.

2. White *v.* Corlies, 46 N. Y. 467

Corlies got an estimate for fitting up his offices from White, who was a builder. Then Corlies wrote White a letter in which he said: "Upon an agreement to finish fitting up of offices at 57 Broadway in two weeks from date, you can commence at once." White made no reply, but on the same day purchased lumber and made other preparations to begin the job. On the following day he received a note from Corlies in which

Corlies countermanded his earlier letter. White brought suit against Corlies for damages.

3. Commercial Telegraph Co. *v.* N. Y. Stock Exchange, 47 Hun (N. Y.) 494

The telegraph company, desiring to have reporters on the floor of the Stock Exchange to collect quotations which it planned to send out on a ticker service to its customers, was negotiating with the Stock Exchange authorities to make the necessary arrangements. The Exchange officials wrote to the telegraph company stating: "We forward to you the following plan which will form a basis of agreement with you in the matter of your proposed service on the floor of the Exchange." This was followed by various regulations under which the telegraph company was to act, including a provision for rent but not including any provision as to the duration of the privilege. The telegraph company replied: "The plan set forth is satisfactory; we accept the same and are willing to execute an agreement upon the basis proposed." The Exchange authorities refused to sign the contract and the telegraph company brought this action to force the Exchange to carry out its alleged agreement.

4. Nebraska Seed Co. *v.* Harsh, 98 Neb. 89; 152 N. W. 310; 1915 F. L. R. A. 824

The plaintiff corporation engaged in buying seed sued Harsh for damages for failure to supply seed under an alleged contract. The plaintiff proved that it had sustained damages under a contract alleged to have been consummated by a letter from the defendant and a letter from the plaintiff. The defendant's letter was as follows:

> "Neb. Seed Co., Omaha, Neb.—Gentlemen: I have about 1800 bu. or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want $2.25 per cwt. for this seed f.o.b. Lowell.
>
> Yours truly,
> H. F. Harsh."

To this the plaintiff sent the following wire:

> "H. F. Harsh, Lowell, Nebr.—Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load.
>
> The Nebraska Seed Co."

5. International Text Book Co. *v.* Edward Connelly, 206 N. Y. 188

Connelly, while under age, had made a contract with the International Text Book Company for a course of instruction in engineering. Connelly

paid part of the price and received a set of books. About three and one-half months after he became of age he made a $5 payment to the company, but he did not receive any further instruction after reaching his majority and returned the books. On the strength of the $5 payment, the company claimed that Connelly had ratified and was estopped from pleading infancy. The company also relied on the fact that Connelly in signing for the course gave his age as 21.

6. Gregory *v.* Lee, 64 Con. 407; 30 Atl. 53; 25 L. R. A. 618

Lee, who was a student at Yale College, leased a room for the college year of forty weeks at $10 a week from Gregory. After keeping the room and paying for it for three months, Lee moved out and secured another room. Gregory was unable to rent the room for the remainder of the period and sued Lee on the contract. Lee was 19 years old.

7. Green *v.* Green, 69 N. Y. 553; 25 Am. Rep. 233

The defendant, while a minor, had conveyed certain premises to his father for a sum of money which he spent before becoming of age. After reaching his majority he did nothing about the matter for three years; then, giving his father notice that he disaffirmed the sale, he re-entered the premises. Thereupon the father, the plaintiff in this action, sued for trespass.

8. Decell *v.* Lewenthal, 57 Miss. 331

Lewenthal, who was living at home with his parents, was engaged in running a farm on his own account. He purchased certain articles required for the farm from Decell. As he did not pay for the articles, Decell sued, claiming the articles were necessaries.

9. Blinn *v.* Schwartz, 177 N. Y. 252

Blinn while insane, although not so adjudged, conveyed land to Schwartz, the consideration being paid to Blinn's agent. Blinn, on recovering his sanity, brought suit to recover this money from his agent. While that suit was still pending, Blinn brought this action to eject Schwartz from the premises on the ground that he was insane when the deed was executed.

10. Schnell *v.* Nell, 17 Ind. 29; 79 Am. Dec. 453

The wife of Mr. Nell, the defendant, died leaving a will which contained a legacy of $200 for the plaintiff, Mrs. Schnell, but Mrs. Nell left no estate. Her husband, however, desiring to carry out her wishes, entered into an agreement with Mrs. Schnell in which he agreed to give her $200 in consideration of one cent and the love and respect that he bore for his late wife. As Mr. Nell did not carry out the agreement, Mrs. Schnell brought suit.

11. Aller *v.* Aller, 40 N. J. Law 446

Action by payee against maker of non-negotiable note. The note was without consideration; but it was voluntarily given by a father to a daughter as a means of giving her a share in his estate. The note was sealed.

12. Reynolds *v.* Robinson, 64 N. Y. 589

In this case, Mrs. Reynolds, the wife of the plaintiff, had rendered services in taking care of a boarder who was sick with cancer. Mr. Reynolds sued for the value of the wife's services. The boarder put up the defense that the husband was not the proper party, claiming that the wife, and not the husband, was entitled to payment.

13. Smith *v.* Whildin, 10 Pa. 39; 49 Am. Dec. 572

Smith, who was a constable in Philadelphia, sued Whildin for a reward of $100 which Whildin had promised him for effecting the arrest of a certain person against whom local warrants were outstanding. Was Smith entitled to the reward?

14. Sheppey *v.* Stevens, 185 Fed. 147

Stevens, a legatee under a will, had made an agreement with Sheppey, who was an heir of the deceased, to pay Sheppey a certain sum of money if the latter would forbear from contesting the will. Was this agreement binding?

15. Lingenfelder *v.* Wainwright Brewing Co., 103 Mo. 578

This action was brought by the executor of Jungenfeld for services rendered by Jungenfeld as an architect. Jungenfeld made a contract to plan and superintend the construction of some buildings. After making the contract he refused, for certain business reasons, to go ahead with the job. Then the defendants, being in a hurry to get the work done and finding it difficult to get a substitute for Mr. Jungenfeld, agreed to give him an extra 5 per cent on the cost of the buildings if he would carry out his contract. He accepted this offer and carried out his duties as architect. It was for this extra 5 per cent that suit was brought.

16. Hager *v.* Catlin, 18 Hun (N. Y.) 448

Catlin was elected sheriff. Shortly afterwards he made an agreement with the plaintiff, Hager, whereby Hager was to dispose of his farm and be ready on a certain date to move into the jail where he and his wife were to board Catlin, and in return Catlin was to appoint Hager as jailer and deputy sheriff. Hager carried out his agreement by disposing of his farm and holding himself in readiness to perform under the contract, but Catlin refused to appoint him; so Hager brought suit. Catlin demurred to the complaint.

17. Love *v.* Harvey, 114 Mass. 80

The parties to this suit had made a bet as to where the body of a certain person was buried in Holyhood Cemetery. Each party deposited $20 with a stakeholder. It was determined that Love won the bet, but nevertheless the stakeholder gave all the money to Harvey. Harvey had received the money from the stakeholder after Love had notified the stakeholder not to pay it over. Love sued Harvey for $20.

18. Materne *v.* Horwitz, 101 N. Y. 469; 5 N. E. Rep. 331

Materne had contracted to sell Horwitz domestic sardines with foreign labels. Foreign sardines were more expensive. Both parties knew of the deceit. Horwitz refused to accept the goods and Materne sued for the price.

19. Guernsey *v.* Cook, 120 Mass. 501

Cook, who was a large shareholder in a certain corporation, agreed to have Guernsey elected to the office of treasurer if Guernsey in consideration therefor would purchase his (Cook's) stock at par. To this Guernsey agreed and in due time his election was procured by Cook. The former, however, refused to carry out his agreement to buy the stock, whereupon Cook sued him on the agreement.

20. Hall Mfg. Co. *v.* Webster's Steel & Iron Works, 227 Fed. 588

The defendant, a corporation, sold out one branch of its manufacturing business with all the machinery, tools, and good-will pertaining to it for a fair price, and in connection with the sale agreed that it would not again enter into the business of manufacturing any of the articles relating to that branch of the business. Its trade in these articles was very extensive, embracing nearly all the states and a large part of Canada. As the defendant did not carry out its agreement, the plaintiff brought this action to restrain it from continuing to manufacture these articles.

21. Pratt *v.* Short, 79 N. Y. 437; 35 Am. Rep. 531

The plaintiff was the assignee in bankruptcy of a savings bank which, under the law, was allowed in making loans to accept only certain kinds of securities as collateral. It was not allowed to loan money on commercial paper. Nevertheless in violation of the law, a loan had been made to the defendant on his note. As the note was not paid, the plaintiff brought suit. The defense was that the statute made the whole transaction illegal.

22. Walker *v.* Johnson, 96 U. S. 424; 24 Law. Ed. 834

Walker had assigned to Johnson a contract for the construction of a lock and dam in the Illinois River. The contract was made on July 21, 1869, and the work was to have been completed not later than Septem-

ber 1, 1871. The assignment was oral. Walker also agreed to furnish Johnson with certain materials that he would need for the job. As Walker did not carry out his oral agreement to furnish the material, Johnson sued him for damages for breach of contract. Walker's defense was the Statute of Frauds on the ground that the contract was for more than a year and therefore should have been in writing.

23. Warner *v.* Texas & Pacific Ry. Co., 164 U. S. 418

Action brought by plaintiff in 1892 on an oral contract he made with defendant in 1874 whereby defendant agreed to maintain a certain switch for plaintiff's benefit for shipping purposes as long as he needed it. Defendant set up the Statute of Frauds. Plaintiff testified that he had built a large sawmill, acquired timber lands and expended large amounts of money in reliance on the maintenance of the switch and that its removal by the defendant had caused him $50,000 damages. Plaintiff admitted that when the contract was made he expected to continue the business as long as he lived.

24. Mallory *v.* Gillett, 21 N. Y. 412

Mallory had possession of a canal boat on which he had a lien for repairs. On Gillett's oral promise to be responsible for the amount due, Mallory delivered the boat to the owner. Gillett failed to keep his promise, and on being sued, set up the Statute of Frauds.

25. Nugent v. Wolfe, 111 Pa. St. Rep. 471

A certain bank recovered a judgment against John Power & Co. The defendant, being a stockholder of John Power & Co., desired to prevent the enforcement of the judgment against the company. So he induced Nugent, the plaintiff, to assume the judgment on his oral promise that he would reimburse Nugent for any loss. Nugent was forced to pay the judgment. He then sued Wolfe on his oral promise. Wolfe's defense was the Statute of Frauds.

26. Mentz *v.* Newwitzer, 122 N. Y. 491; 25 N. E. 1044

The plaintiff, through an auctioneer, sold some realty to the defendant. The only memorandum of the sale was made and signed by the auctioneer. The memorandum described the property, stated the price, and gave the name of the buyer, but did not give the name of the seller. As the defendant refused to carry out the contract, the plaintiff sued for the price.

27. Drake v. Seaman, 97 N. Y. 230

The plaintiff was engaged by the defendant to act as salesman for a period of three years. The defendant gave the plaintiff the following memorandum of the contract: "The understanding with Mr. Drake is as follows: $2,000 for the first year; $2,500 for the second year sure, and,

provided the increased sales will warrant it, he is to have $3,000." As the defendant refused to carry out the arrangement, the plaintiff sued for breach of contract. Seaman's defense was the Statute of Frauds.

28. Haven *v.* Foster, 26 Mass. 112

Land in New York inherited by the plaintiff and three other heirs (residents of Massachusetts) was conveyed by them and the proceeds shared equally in the belief that each under the law was entitled to a one-fourth interest, as would be the case under the Massachusetts law. Subsequently it was ascertained that the plaintiff was entitled to a one-half interest under the New York law and she sued to recover an additional one-fourth.

29. Walker *v.* Ebert, 29 Wis. 194; 9 Am. Rep. 548

This was an action on a promissory note. The defense interposed by Ebert was that he was unable to read or write the English language and could simply write his name, and that he signed the note thinking that it was a contract, because it had been represented to him by a certain person as a contract appointing him as agent to sell certain patent rights.

The plaintiff had purchased the note in good faith, for value and before maturity. Was this mistake by Ebert as to the character of the instrument that he was signing a defense to the action on the note?

30. Kyle *v.* Kavanagh, 103 Mass. 356; 4 Am. Rep. 560

This was an action for the price of land, which in the agreement of sale was described as "4 lots of land in Waltham on Prospect Street." Subsequently it was discovered that there were two Prospect Streets in Waltham. Kyle meant one street and Kavanagh the other. Consequently, Kavanagh refused to accept the deed offered by Kyle to four lots on the street that he (Kavanagh) did not have in mind.

31. Dixon *v.* Wilmington Savings & Trust Co., 115 N. C. 274; 20 S. E. Rep. 464

The plaintiff signed a paper, which was a mortgage on her land, without reading it. She did this because she relied on Davis, her agent, who told her that the paper amounted to nothing. The mortgage was made out to the defendant who took it in good faith and paid value for it. The money was obtained by the agent but was not turned over to the plaintiff. The plaintiff brought this action to have the mortgage canceled on the ground of mistake and fraud.

32. Sawyer *v.* Prickett, 86 U. S. 146; 22 Law. Ed. 105

The defendant gave a mortgage to secure his note for $2,000, which he gave to buy railroad stock. The railroad was about to be built near his property. As the note was not paid, this action was brought to fore-

close the mortgage. The defendant claimed that the mortgage note was secured from him by fraudulent statements. The representations were that the defendant's property would be greatly enhanced in value by the railroad, that the railroad would enable him to sell his products in a better market, that the road would be constructed and equipped within one year, that the company would pay 30 per cent dividends upon its stock. The road was never even completed.

33. Lewis *v.* Jewell, 151 Mass. 345; 24 N. E. Rep. 52

This was an action based on fraudulent representations alleged to have been made by the defendant in selling carpet. The carpet was represented to contain 900 yards, whereas it contained only 595 yards. The carpet at the time of sale covered four floors, a hall, and a stairway in a dwelling house. The yardage of the carpet was an important element in fixing its value.

34. Robson & Sharpe *v.* Drummond, 2 B. & Ad. (Eng. Rep.) 303

Sharpe hired a carriage to Drummond at a yearly rental for five years. As part of the contract, Sharpe agreed to paint the carriage every year and to keep it in good repair. Robson was a partner of Sharpe but Sharpe made this contract as an individual. After three years Sharpe retired from business and informed Drummond that Robson would look after the repairing of the carriage and would also receive the rent. Drummond refused to have anything to do with Robson and returned the carriage, whereupon suit was brought for the rental for the last two years.

35. Arkansas Valley Smelting Co. *v.* Belden Mining Co., 127 U. S. 379; 32 Law. Ed. 246

The defendant made a contract to sell to Billings and Eilers certain ore which was to become the property of Billings and Eilers on delivery and to be paid for after a subsequent assay. The contract was assigned by Billings and Eilers to Billings, who later assigned the contract to the plaintiff. The defendant was notified of the assignment, but refused to carry out the contract with the plaintiff and notified the plaintiff that the contract was canceled. The plaintiff sued for damages for non-delivery.

36. Heaton *v.* Angier, 7 N. H. 397

The plaintiff sold a wagon to the defendant at auction for $30.25. On the same day the defendant sold the wagon to John Chase for $31.25. Chase and the defendant went to see the plaintiff. Chase offered to pay the $30.25 to the plaintiff for the defendant and the plaintiff agreed to accept Chase's promise to pay. Then the wagon was delivered to Chase. As Chase did not pay as agreed, the plaintiff sued the defendant.

37. The Home *v.* Selling et al., 91 Or. 428; 179 Pac. 261

The plaintiff sues the defendants, an executor and a corporation, for interest on a mortgage which it was claimed the defendants had contracted to pay. The testator whose estate was represented by the executor, purchased the property by a deed which described the mortgage and stated "the grantee herein in part consideration for this conveyance assumed payment of the $40,000, unpaid balance of the said mortgage." The testator conveyed the property to the corporate defendant by deed with a similar clause.

38. Adams Radiator & Boiler Works *v.* Schnader, 155 Pa. St. 394; 26 Atl. Rep. 745

This was an action for the price of a heater which was sold under a written contract. The contract provided in part as follows: "We (plaintiff) guarantee this apparatus for heating by steam to be constructed in a good, thorough, and workman-like manner, to give entire satisfaction in its operation, and to work entirely noiselessly. Should it prove unsatisfactory after a thorough and reasonable trial, we will remove it at our expense, refund the money paid to us on account of it, and will place the building in as good a condition as it was when we received it for the purpose of installing our steam heating apparatus."

The defendant testified that the heater failed to heat the building and that it was unsatisfactory. A plumber, representing the plaintiff, testified that on an examination of the heater after its installation, he found it working satisfactorily. The issue in the case was whether the plaintiff had to furnish a heater that would actually satisfy the defendant, or whether it was sufficient to furnish a heater which would satisfy the ordinary reasonable man.

39. Knight *v.* Abbott, 30 Vt. 577

The defense in this action was a tender. The evidence was that the defendant had remarked to the plaintiff as he was going by on a team: "I want to tender you this money before Mr. Dodge (at the same time holding in his hand $35.50) for labor you have done for me." The plaintiff, however, paid no attention, but drove along with his team and made no reply. The defendant in his remarks to the plaintiff did not name the sum which he wished to tender, nor did he state the amount that he held in his hand, although it appeared that the amount was $35.50. Was this a good tender?

40. Flynn *v.* Hurlock, 194 Pa. St. 462; 45 Atl. 312

This was an action for work and material. Plaintiff had rendered the defendant a bill for $3,990.50. The defendant offered to pay the bill if the plaintiff would give him a receipt "in full of all demands." The

plaintiff accepted the money and signed the receipt, but as he did so he stated orally that he waived no right to recover for other claims.

41. Moha *v.* Hudson Boxing Club, 164 Wis. 425; 160 N. W. 266; L. R. A. 1917B, 1238

Moha, a professional boxer sues the Hudson Boxing Club to recover 22½% of the gross receipts of a boxing contest. Moha had contracted with the defendant to box Mike Gibbons of St. Paul ten rounds, "to a no decision" and the contract provided that Queensbury rules would prevail. During the contest Moha struck Gibbons a blow below the belt and the referee stopped the contest.

42. Hale *v.* Spaulding, 145 Mass. 482

Action upon a sealed instrument whereby six defendants agreed to pay Hale six-sevenths of any loss that he might suffer on a certain note.

Defendant Saltmarsh answered that Hale had given one of the defendants named a sealed instrument reading in part as follows: "Received of L. V. Spaulding $1,060.84, in full satisfaction for his liability on the document" (describing it). Hale had in fact settled with each of the defendants except Saltmarsh.

43. Spalding *v.* Rosa, 71 N. Y. 40; 27 Am. Rep. 7

Rosa had made a contract with Spalding, who was the proprietor of a theater, to furnish the "Wachtel Opera Troupe" for a certain number of performances. Wachtel, from whom the company took its name, was well known and was the chief attraction and inducement for Spalding to make the contract. Wachtel became ill and could not sing; because of this Rosa did not carry out the contract. Spalding sued for damages for the alleged breach of contract.

44. Harmony *v.* Bingham, 12 N. Y. 99; 62 Am. Dec. 142

The defendant contracted to transport merchandise within a certain time. A certain amount was to be deducted for each day's delay. Because of an unusual freshet which made a canal impassable, the delivery was delayed beyond the contract time. The defendant refused to allow the deduction for delay on the ground that the delay was unavoidable and refused to deliver the merchandise until the full price was paid. The plaintiff paid this under protest and sued to recover the amount which he claimed should have been deducted in accordance with the claim.

45. Labaree Co. *v.* Crossman, 100 App. Div. (N. Y.) 499; affirmed, 184 N. Y. 586

The defendant sold a certain cargo of coffee to the plaintiff to be delivered in New York at a certain time. Because the cargo came from an

infected port, the Board of Health at New York refused to allow it to be landed. The plaintiff sued for damages for non-delivery.

(a) Would it make any difference if the subject matter of the contract had not been a selected cargo, that is, if the contract had simply called for the sale and delivery of a certain quantity of coffee at a certain time?

46. Sewell *v.* Underhill, 197 N. Y. 168; 90 N. E. 430; 27 L. R. A. (N. S.) 233; 134 Am. St. Rep. 863; 18 Ann. Cas. 795.

Underhill contracted with Sewell to sell him for $25,000 a parcel of real estate on which a house was situated. After the contract had been made the house burned down. Sewell sued Underhill for damages upon the theory that there had been a breach of the agreement because of the failure to convey the house.

47. Davis Co. *v.* Hoffman-LaRoche Chemical Works, 178 App. Div. (N. Y.) 855

In December, 1913, the parties entered into a written contract whereby the defendant agreed to supply the plaintiff with a certain quantity of chemicals which the defendant expected to get from Europe. The contract gave the seller the right to cancel on the ground of "contingencies beyond our control—fire, strikes, accidents to our works or to our stock, or change in tariff." After the Great War broke out, the defendant, being unable to procure the chemicals from the other side because of the embargoes laid by foreign countries, notified the plaintiff that it elected to cancel the contract under the stipulation quoted. The plaintiff refused to accept this and sued for damages, as the price of the chemicals had risen tremendously.

48. Canda *v.* Wick, 100 N. Y. 127; 2 N. E. Rep. 381

The plaintiff agreed to deliver to the defendant 400,000 bricks which the latter agreed to pay for at $7.25 per thousand. The bricks were to be delivered from time to time at the plaintiff's convenience, but without delaying the defendant. Prompt delivery and acceptance were contemplated by the parties. After the plaintiff had delivered only 2,000 bricks, the defendant refused to receive the remainder. The real reason for the refusal was that the price of bricks had fallen to $6.75 in the market. The plaintiff offered to deliver the balance and stated that if the price advanced he would not be held responsible for delivery. This offer to deliver was repeated but refused. The defendant changed his mind and demanded delivery when the price had advanced to $8.25 per thousand. The plaintiff sued for breach of contract.

49. Hale *v.* Trout, 35 Cal. 229

Plaintiffs sued on a contract to deliver lumber by instalments. The action was for the agreed price of lumber delivered and for damages for

alleged breach of contract by defendants in refusing to take any further deliveries under the contract. The question was whether plaintiffs were pursuing inconsistent remedies.

50. Norrington *v.* Wright, 115 U. S. 188; 29 Law. Ed. 366

The plaintiff contracted to sell to the defendant 5,000 tons of iron rails to be delivered at the rate of about 1,000 tons a month beginning February, the whole amount to be delivered by August 1. Payment was to be made on delivery. Only 400 tons were shipped in February. This shipment the defendant accepted and paid for, supposing it only a portion of the February consignment. Not until the arrival of the March consignment of 885 tons did the defendant learn that the 400 tons sent in February comprised the entire February shipment. Then the defendant rescinded the contract. The plaintiff sued for the defendant's failure to take the balance of the iron.

51. Jansen *v.* Schneider, 78 Misc. Rep. (N. Y.) 48

Plaintiff made an agreement with the defendant for instruction in aviation for which he was to pay the defendant $250. He paid $150 in advance and the remaining $100 was to be payable after the plaintiff had received the lessons and was able to fly. After receiving some instruction in the shop, where the plaintiff learned how to assemble the parts of the airplane, the plaintiff waited six weeks for field lessons. Finally in response to a lawyer's letter, the defendant gave him one lesson which lasted only about a minute, as the machinery did not work. After repeated demands and refusal for flying instruction, the plaintiff brought suit for the return of the $150. The defendant claimed that he should be allowed some credit for the shop instruction received by the plaintiff.

52. Equitable Gas Light Co. *v.* Baltimore Coal Tar & Mfg. Co., 63 Md. 285

The defendant agreed to sell to the plaintiff all the coal tar manufactured by it during a certain period. The defendant refused to carry out the agreement and the plaintiff filed a bill for specific performance. It was proved on the trial that coal tar was indispensable to the plaintiff's business, that the plaintiff could not obtain the supply from any other parties in Baltimore, and that it would be subjected to great additional expense in trying to get the coal tar from distant cities.

53. Griffin v. Colver, 16 N. Y. 489; 69 Am. Dec. 718

The plaintiff made a contract with the defendant to build a steam engine with boilers, etc., and deliver it on a certain day. Delivery was a week late. During this time the defendant was unable to use a certain machine in his lumber-mill which the plaintiff knew the steam engine was intended to drive. The plaintiff sued for the price of the engine and the

defendant put in a claim for damages due to the delay. The defendant offered to give evidence tending to show that his damages were $50 a day. This figure was made up by considering the quantity of lumber the machine driven by the engine was to cut up and clean in a day, the price received by the defendant for his work, and the expenses of running and wear and tear. Was this evidence proper?

54. Hammer *v.* Schoenselder, 47 Wis. 455; 2 N. W. 1129

The plaintiff, who was a butcher, had a contract with the defendant, whereby the defendant was to furnish him with whatever ice he might require for his ice-box for the season of 1878. The defendant had supplied the plaintiff with ice the previous season and knew for what purpose the plaintiff needed the ice. In July the defendant stopped supplying ice and refused to continue the contract. As a result the plaintiff lost a considerable quantity of fresh meat and suit was brought for the value of the meat spoiled. What damages was the plaintiff entitled to?

55. Clark *v.* Marsiglia, 1 Denio (N. Y.) 317

This was an action for work, labor, and material. The defendant had given to the plaintiff a number of paintings to be cleaned and repaired at a certain specified price. After the plaintiff had started the work, the defendant directed him to stop, but the plaintiff insisted on going on and over the defendant's objection, finished the job, and then claimed that he was entitled to recover for the whole.

SALES

56. Decker *v.* Furniss, 14 N. Y. 611

Brown, being the owner of the steamer *Rhode Island,* made a contract with the defendant, Furniss, whereby it was stated that "Brown sells to Furniss one-half of the steamer as she now is completely fitted and furnished for the transportation of passengers on the Sound at the rate of $50,000 for the whole boat, payable in fifteen months by Furniss's note in favor of Brown." The contract also provided that Brown was to have the steamer fitted up so that she could be used for trading along the west coast of America and that Furniss was to pay one-half of the expenses. The note was to be payable in fifteen months from the date the steamer was ready for sea. The plaintiff had been employed by Brown, but had not been paid. He sued Brown and Furniss jointly. Was Furniss liable?

57. Stone *v.* Ross, 61 N. Y. 614

This action involved the sale of grape roots for which the buyer had paid the purchase price. When the roots were delivered they were found

to be dead and of no value, whereupon the buyer sent them back and demanded repayment of the price.

58. Dexter *v.* Norton, 47 N. Y. 62

Dexter sued Norton for damages for non-delivery of 161 bales of cotton. Under the contract 607 bales, bearing certain marks and numbers, were to be delivered after various things had been done. The larger portion had been delivered when the remaining 161 bales were destroyed by fire.

59. Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487

Plaintiff and defendants on December 27, made a contract whereby defendant agreed to manufacture steel caps for 400 iron rails by April 1 following. On March 10, defendant's mill was burned down and defendant claimed that it was thereby released from performance. Plaintiff claims damages for non-delivery.

60. Schenning *v.* Devere & Schloegel Lumber Co., 173 Wis. 20

Plaintiffs, under a contract to sell lumber f.o.b. cars to defendant, had brought lumber to a siding and requested defendant to give them orders for loading the lumber, calling attention to the danger from fire. Defendant said it would give instructions in a couple of days; but it did not do so and ten days later the lumber was destroyed by fire.

61. Kimberly *v.* Patchin, 19 N. Y. 330; 75 Am. Dec. 334

Dickinson had 6,250 bushels of grain stored in his warehouse when the following transactions took place. Shuttleworth bought 6,000 bushels from Dickinson, who gave Shuttleworth a bill of sale and also a warehouse receipt which stated that he was holding 6,000 bushels of grain in his warehouse subject to Shuttleworth's order. Shuttleworth then sold the 6,000 bushels to the defendant and assigned the bill of sale and the warehouse receipt to the defendant. Sometime after this Dickinson sold all the grain in the warehouse to the plaintiff, but the defendant got possession of the 6,000 bushels. The plaintiff, taking the position that the defendant never had title to any of the grain, sued him for the value of the 6,000 bushels.

62. Terry *v.* Wheeler, 25 N. Y. 250

The plaintiff's assignee had paid the defendant for a quantity of lumber which was in the defendant's lumber-yard. The lumber had been selected, set aside, and paid for; and a bill of sale had been given. On the bill of sale there was indorsed a memorandum that the lumber was "to be delivered to the cars free of charge." Before being delivered to

the railroad station, the lumber was destroyed by fire. The plaintiff sued for the return of the price.

63. Higgins *v.* Murray, 73 N. Y. 252

The plaintiff had manufactured some goods for the defendant under contract. The contract did not specify the place of delivery. The plaintiff, at the request of the defendant, shipped the goods to the defendant at Lewiston, Maine. The goods were shipped C. O. D., and were destroyed by fire while in transit. The plaintiff sued for the price.

64. Canales *v.* Earl, 168 N. Y. Supp. 726

Canales sued Earl for the conversion of an automobile. Canales gave the machine to his chauffeur to ship it to Havana. Instead the chauffeur sold the car to the Broadway Used Car Company, which sold it to Berkert, who sold it to Jones and the latter sold it to Earl. At the time of the sale the chauffeur had receipts from Canales' vendors and a consular invoice.

65. O'Conner's Admix. *v.* Clark, 170 Pa. St. 318; 32 Atl. 1029; 29 L. R. A. 607

The original plaintiff leased a wagon to Tracy, who, with the permission of the original plaintiff, painted his name and occupation on the wagon and used it in his business. Tracy sold the wagon to Clark who was an innocent purchaser. Action is brought against Clark for conversion.

66. Cornell *v.* Clarke, 104 N. Y. 451; 10 N. E. Rep. 888

A railroad company made a contract with Munson, whereby he was to furnish the company with 20,000 railroad ties at 55 cents each for the first-class ties, and 35 cents for "what shall be adjudged second-class ties," to be inspected and counted by a certain inspector. Munson delivered a quantity of ties which were never inspected or divided into classes. The railroad company became insolvent and this property was sold on foreclosure. The question arose as to whether the title to the ties had ever passed from Munson to the railroad company.

67. Evans *v.* Pelta, 146 App. Div. (N. Y.) 749

The defendants gave the plaintiff's agent an order for merchandise of the value of $366. The latter made a memorandum which he transmitted to the plaintiff. But this memorandum was not signed by the defendants. A few days later the defendants wrote to the plaintiff acknowledging that they had "placed an order for a few skirts on December 7" and requesting the plaintiff to delay shipment. Finally, the plaintiff shipped the goods, which the defendants refused to receive and wrote that the order was countermanded. The plaintiff sued for the price.

68. Calvert *v.* Schultz, 143 Mich. 441; 106 N. W. Rep. 1123

The defendant gave the plaintiff an oral order for a car of coal then in the railroad yard. The plaintiff directed the railroad company to turn the car over to the defendant, and on the same day sent to the railroad company a written order to the same effect. On the trial the defendant set up the Statute of Frauds. The plaintiff claimed that a written contract was unnecessary because of a custom prevailing among coal dealers by which an order to the railroad company to turn the coal over to the purchaser was considered as equivalent to a delivery and acceptance.

69. Armstrong *v.* Orler, 220 Mass. 112

Armstrong purchased shares of stock of the value of more than $50 under an oral agreement with Orler whereby Orler agreed that he would take back the shares at the same price at any time Armstrong wished to return them. Armstrong tendered back the stock and Orler refused to take it and when sued set up the Statute of Frauds.

70. Mixer *v.* Howarth, 21 Pick (Mass.) 205

In this case the plaintiff had made up a buggy according to the oral directions of the defendant. The directions of the defendant were very specific and the buggy was made up especially for him. When it was completed, he refused to pay for it. The plaintiff sued for the price. The defendant set up the Statute of Frauds as his defense.

71. Atlas Shoe Co. *v.* Rosenthal, 242 Mass. 15

Plaintiff took an order from defendant for special styles of shoes, which were not suitable for sale in the ordinary course of business. Plaintiff being only a shoe dealer, placed the order with a manufacturer. Defendant failed to take the shoes and when sued set up the Statute of Frauds.

72. Stevens *v.* Bradley, 89 Iowa 174; N. W. Rep. 429

The defendant sold at auction a number of hogs. The defendant said that the hogs were as thrifty a lot as he had ever owned, and that he had been in the hog business for a good many years. The hogs were affected with cholera at the time and died shortly afterward. The plaintiff sued for loss of the hogs, for the expense of caring for them, and also for the loss of other hogs, to which the disease had been communicated. Was the plaintiff entitled to any of the damages claimed? Why?

73. Forcheimer *v.* Stewart, 65 Iowa 593; 22 N. W. Rep. 886

The plaintiff, a provision dealer in Mobile, Ala., bought from the defendant, a pork packer in Council Bluffs, Iowa, hams, which the

defendant in the correspondence stated were "choice, spiced, sugar-cured, canvased hams." The plaintiff did not see the hams before their arrival. As they were of inferior quality, he sued for damages for breach of warranty.

74. Gaar Scott Co. *v.* Halverson, 128 Iowa 603; 105 N. W. Rep. 108

In this case the salesman, in selling a second-hand machine, stated that it was practically as good as new, that it would steam well, and that it was of sufficient power to drive the defendant's threshing machine. The engine turned out to be defective and did not work well. When sued for the price, the defendant set up breach of warranty.

75. Cash Register Co. *v.* Townsend, 137 N. C. 652

The plaintiff's salesman, in making a sale of a cash register to the defendant, stated that the cash register would save the expense of a bookkeeper, that it provided for the keeping of books on the machine, and that it would save one-half the time formerly spent in keeping books. After paying part of the price, the buyer found that the machine did not come up to the predictions made by the salesman. He refused to pay the balance, and when sued, set up the defense that he had been induced to buy by these statements of the salesman, and that the statements were false.

76. Shields *v.* Pettie, 4 N. Y. 122

In a suit by Shields against Pettie a question arose as to the construction of the following bought and sold note:

> "New York, July 19/47. Sold for Messrs. Geo. W. Shields and Co. to Messrs. Pettie and Mann, 150 tons Gartshemi pig iron, No. 1. at $29 per ton, one half at 6 mos. one half cash less 4 per cent, on board Siddons.
>
> Thomas Ingham, broker."

It was understood by the parties that the ship was at sea. It arrived without the shipment.

77. Barrington *v.* Hotel Astor, 184 App. Div. (N. Y.) 317

The plaintiff went into the restaurant of the Hotel Astor in New York, and ordered kidney sauté. After eating part of the sauté, he discovered that it contained parts of a mouse. This discovery made him violently sick, and he was ill for several weeks. Was he entitled to any damages, and, if so, for what reason?

78. Bonwit Teller & Co. *v.* Kinlen, 165 App. Div. (N. Y.) 351

This action was brought by a department store to recover the price of a dress and waist purchased by a customer. The defense was that there was an implied warranty that the goods would be fit to wear, and

that in fact they were not wearable. The defense showed that the buyer at the time of purchase asked no questions about the waist. The only question she asked in regard to the dress was as to whether it would wear well. The saleswoman replied that it was the best material that could be put in the dress for the money. Was there any implied warranty by the seller that the goods sold would be fit for use as wearing apparel?

79. Rice v. Friend Bros. Co., 161 N. W. Rep. 310

In this case the buyer ordered roof paint from a manufacturer of paint. The buyer did not have an opportunity to inspect the paint until it was delivered. The manufacturer knew that the paint was to be used for roof paint. The paint turned out to be of a very poor quality. Was there any warranty in this sale as to the quality of the paint?

80. Empire Cream Separator Co. *v.* Quinn, 184 App. Div. (N. Y.) 302

The plaintiff, a manufacturer, made a contract with the defendant, a farmer, to sell him a mechanical cow-milking apparatus, consisting of a pumping outfit and three mechanical milker units with pails. These articles were sold under the trade name of "Empire Mechanical Milker." After the defendant had tried the mechanism for about ten days he wrote to the plaintiff that the milker was unsatisfactory and that he would not pay for it. The plaintiff sued for the price. The defendant set up breach of warranty as his defense, claiming that there was a warranty that the milker would be fit for the purpose intended.

81. Ames *v.* Jones, 77 N. Y. 614

This action was brought for damages for the failure of the defendant to buy 30,000 bushels of barley under a contract of sale. The defendant claimed that the sale was by sample and that the barley offered for delivery was greatly inferior to the sample shown. The evidence showed that the defendant's agent had been shown a sample of barley by the plaintiff, that the agent had then taken the sample to the defendant who had telegraphed the plaintiff for "30,000 choice Napanee" (the name of the place where the barley was grown), and that the plaintiff had sent a telegram of acceptance. At the time the sample was shown to the defendant's agent, nothing was said as to whether or not the bulk of the barley would correspond with the sample. Was this a sale by sample?

82. Kein *v.* Tupper, 52 N. Y. 550

Kein sued Tupper for the price of 119 bales of cotton sold by sample. The contract covering the transaction described the bales by markings and provided that the cotton was to be weighed and samples taken and compared with the original samples. Kein gave Tupper an order on the warehouse for the 119 bales. Of these 70 had been taken out, weighed,

sampled and then returned to the warehouse to be held for Tupper. Before these samples could be compared, the entire lot was destroyed by fire.

83. Tuthill *v.* Skidmore, 124 N. Y. 149; N. E. Rep. 348

Property had been sold by the plaintiff to Lawton, but not delivered. Lawton gave notes for the purchase price. These notes became due and were dishonored. Subsequently the defendant obtained an attachment against Lawton and levied on the goods, although they were still in the possession of the plaintiff. Then the plaintiff brought an action of replevin against the defendant, claiming that he was entitled to the possession of the goods as he still retained the seller's lien.

84. Foote & Co. *v.* Heisig & Norvell, 94 S. W. Rep. 362

This action was brought by the plaintiffs to recover damages from the defendants for breach of a contract to buy merchandise. The contract required the defendants to give shipping directions. Although the defendants were asked repeatedly for such directions, they remained silent and the circumstances showed that they did not intend to go ahead with the contract. Finally the defendants wrote that they would not take the goods under any circumstances. Then the plaintiffs notified the defendants that they would sell the goods for their account and hold them for the difference. Accordingly the plaintiffs sold the goods and sued for the loss.

85. Sour Lake Town Site Co. *v.* The Furniture Co., 39 Texas Civil Appeal 86; 94 S. W. Rep. 188

The Furniture Co. sued the Town Site Co., to recover damages for a breach of contract to buy furniture, as the latter refused to accept the goods. The seller took the goods back, sending some articles back to the factory, putting others back in stock in the furniture store, and finally selling them at retail. On the trial the Town Site Co. claimed that the proper measure of damages in regard to the articles which had been resold, was the difference between the contract price and the amount at which said articles were sold. Under the circumstances what remedies did the Furniture Co. have?

86. Mosler Safe Co. *v.* Brewer, 100 Misc. (N. Y.) 107

The defendant made a written contract with the plaintiff to buy a safe. Before the safe was delivered the buyer repudiated the contract and notified the plaintiff that he would not accept delivery. The plaintiff brought an action for the price of the safe. On the trial the plaintiff did not produce any evidence that the safe could not readily be resold for a reasonable price, nor did it produce any evidence that it had at any time notified the buyer that the goods were held by the plaintiff

as the bailee for the buyer. Was the plaintiff entitled to a judgment for the price? If not, what was its proper remedy?

87. Buckley *v.* Furniss & Stickney, 15 Wendell (N. Y.) 137

The plaintiff received an order from Titus for iron to be sent in care of Green to Plattsburg for forwarding. The plaintiff was in Albany and Titus was in Malone, N. Y. The iron was sent to Green, who, after a delay, gave it to a common carrier to convey to Titus. Before the shipment reached Titus in Malone, it was levied on by a sheriff who had an attachment in favor of the plaintiff against Titus. Several weeks later, the plaintiff brought a replevin action.

Consider these questions: Can the right of stoppage in transit be exercised after the goods have been attached by a creditor but before the transit has ended? Did the transit in this case end at Plattsburg?

88. Messmore *v.* The New York Shot & Lead Co., 40 N. Y. 422

The plaintiff made a written contract with the defendant to buy a large quantity of bullets at the price of 7 cents per lb.

The plaintiff was under contract with the state of Ohio to furnish it with the quantity and quality of bullets called for by his contract with the defendant at the price of 7¼ cents per pound, plus transportation expenses. The plaintiff testified that at the time he was negotiating with the defendant's agent, he told the defendant's agent about this contract that he had with the state of Ohio, and that the defendant's agent refused to enter into the proposed contract until he had been shown the Ohio contract, and that the plaintiff then showed it to him. The plaintiff also testified that he explained to the defendant's agent that he desired to secure from the defendant the ammunition for carrying out his Ohio contract. The goods furnished were defective and were rejected by the state of Ohio. The plaintiff then brought this action, suing the defendant for the profits that he would have made had his contract with the state of Ohio been carried out.

89. Raymore Realty Co. *v.* P. Nesbit Co., 145 App. Div. (N. Y.) 163

The plaintiff made a written contract with the defendant for the purchase of about 100,000 Roman bricks to be delivered as ordered. The defendant knew that the bricks were wanted by the plaintiff for the construction of a certain apartment house. At the time of making the contract, the plaintiff informed the defendant that he would suffer a considerable loss if there were any delays in delivery. As a result of the defendant's delays in the delivery of the bricks, the completion of the building was delayed for about three months. On the trial the plaintiff claimed these four items of damages:

1. $1,700 paid the building contractor as damages for delay. Of this item, $300 was for the amount paid the workmen when idle and

waiting for more bricks to be delivered. The balance of $1,400 was estimated as damages claimed to have been sustained by the builder in being prevented from doing work on other contracts outside of the building in question.

2. Interest on the value of the property during the period of delay.
3. $486, the proportionate amount of taxes assessed on the property, for the period in question.
4. $7,778 rentals lost by reason of the delay.

Which, if any, of these items is the plaintiff entitled to? Why?

90. Butler *v.* Wright, 186 N. Y. 259

Butler made a contract with Wright to turn over to the latter certain stock in return for which Wright agreed to deliver to Butler 500 shares of the capital stock of Wright's Automatic Tobacco Packing Machine Co. Although Butler offered to carry out his part of the contract and made demand on Wright to turn over the stock of the Packing Machine Co., Wright refused to comply. The evidence showed "that the stock of the Wright Co. had never been listed on any exchange or had any quoted value or any definite market price or any certain value capable of any exact ascertainment; and that the defendant was the owner of at least 92 per cent of the stock and controlled the balance." The plaintiff asked the court to order the defendant to specifically perform his contract.

91. Parks *v.* Morris Ax & Tool Co., 54 N. Y. 586

This action was for the price of steel purchased by the defendant of the plaintiff. The defense was that the steel had been warranted as equal to the best English ax steel, and that the steel delivered was not up to the warranty. The evidence showed that there was an express warranty, that the defendant relying upon it had manufactured 2,000 dozen axes from the steel, that the steel was not of the quality warranted but was much inferior, and that as the result of the defective steel furnished, the axes manufactured were worth $1.50 per dozen less than they would have been if the quality had been as warranted. The defendant then sued for damages of $3,000. What damages, if any, was he entitled to?

92. Bruce *v.* Fiss, Doerr & Carroll Horse Co., 47 App. Div. (N. Y.) 273; 62 N. Y. Supp. 96

The facts as stated in the report of the case were as follows:

"The action is brought for damages for breach of warranty given on the sale of a horse, that the horse was sound, kind, and true, and gentle and quiet in harness, and suitable for use by plaintiff in his profession as a physician, to drive in harness as a carriage horse. The damages sought to be recovered were for injuries to the plaintiff and his vehicle arising from the kicking and running away of the horse. Subsequent to the occurrence of the damages complained of, the plaintiff

returned the horse to the defendant and was repaid his money, but, as the plaintiff testified and as the jury found, without relinquishing his claim against the defendant for his damages."

Was the plaintiff entitled to the damages sought provided the facts were as alleged? Was the plaintiff also entitled to the difference between the actual value of the horse and its value as represented? What remedies, if any, would the plaintiff have had had he decided to keep the horse?

AGENCY

93. Patterson *v.* Lippincott, 47 N. J. L. 457; Atl. Rep. 506

This action was brought against Barclay Lippincott for the balance due under a written contract for the sale of a license to use Patterson's patent. The contract was signed, "George P. Lippincott, per Barclay Lippincott." After payment for the balance due had been refused, the plaintiff learned that George P. Lippincott was under the age of 21 years and that Barclay Lippincott was his father. George Lippincott was still under 21 at the time of the trial.

94. Johnson *v.* Milwaukee & Wyoming Investment Co., 46 Neb. 480; 64 N. W. Rep. 1100

The Milwaukee & Wyoming Investment Company owned a cattle ranch in Wyoming, but its business office was in Wisconsin. One Adams was employed as manager of the ranch with authority to purchase supplies, hire men, and send in accounts to the treasurer in Milwaukee who would remit payment for the same, and to gather cattle and ship the same to a commission house in Chicago, but with no authority to ship elsewhere or to sell cattle. Adams, through a cattle salesman in Omaha, sold to Johnson 250 head of cattle from the ranch at $22 a head, Johnson then being in Wyoming. At Johnson's request, Adams shipped the cattle to Central City, Neb., and received checks payable to his order. Neither Johnson nor his Omaha agent had ever before dealt with either the company or Adams. This action was to replevin the cattle from Johnson (the real defendant although named in the the title as the plaintiff in error).

95. New York Tel. Co. *v.* Barnes, 85 N. Y. Supp. 327

The defendant made Purdy the general manager of his drug store. A separate agreement provided, however, that Purdy should buy goods for the store only for cash and that he should not run up any account for any goods or supplies of any kind whatever. Purdy made a contract with the plaintiff for telephone service. The telephone company sued the defendant on this contract made by Purdy.

96. Americus Oil Co. *v.* Gurr, 114 Ga. 624; 40 S. E. Rep. 780

This action was originally brought by Gurr against the Americus Oil Co. for the price of certain cottonseed. The theory of the plaintiff was

that he sold the seed to one Ward, as agent of the defendant, that it received the seed and was therefore liable to him for the price. The evidence showed that the arrangement "between the company and Ward was for him to buy seed and ship the same to the company, he in each instance to pay for the seed purchased with cash furnished him for this purpose by the company." Did Ward have implied authority to buy on credit as he did in this transaction? What kind of an agent was Ward?

97. Worrall *v.* Munn, 5 N. Y. 229

The defendant by a contract under seal agreed to convey certain land to Noah Worrall, the plaintiff. The agreement was signed, "Henry Worrall for Noah Worrall." When the plaintiff offered to perform, the defendant refused to convey the land and the plaintiff sought to get a decree of specific performance. The defense was that Henry Worrall, as agent for Noah Worrall, was acting under oral authority only and therefore could not make a valid contract under seal for his principal.

98. Linnehan *v.* Rollins, 137 Mass. 123; 50 Am. Rep. 287

A builder had a contract with the defendants to take down a certain building which they held as trustees. The contract provided that the builder was "to take down the entire building known as the Adams House belonging to said trustees, or as much thereof as the trustees may request; all of said work to be done carefully and under the direction and subject to the approval of the trustees." The plaintiff was injured by the negligence of a workman employed on the job and sued the defendants as trustees for his injury. The defense was that the builder was an independent contractor.

99. Wycoff *v.* Davis, 127 Iowa 399

The plaintiff's agent, Dahlberg, had authority to sell and deliver the plaintiff's typewriters and collect for them. Dahlberg, who was short in his accounts, went to the defendant and admitted the shortage, and then borrowed $125 from him to send to the plaintiff to make good the shortage. As security, Dahlberg delivered some of the typewriters to the defendant and gave him a receipt for $205. The receipt was in the usual form, acknowledging a part payment of the price of the machines. Dahlberg sent the money to the plaintiff and it was credited to his account. When the plaintiff learned of the transaction, he brought an action of replevin. The defendant offered to give up the machines, but claimed that he was entitled to be reimbursed for the $125.

100. Eberts *v.* Selover, 44 Mich. 519; 7 N. W. Rep. 225

A book agent was selling a book, the price of which was $10. The defendant refused to pay $10 but said that he would take the book for $4.27. The salesman agreed to this. The salesman had a subscription

book in which the buyers signed, giving their names and addresses. At the top and at the bottom of each page in very large print was the statement that the price of the book was $10 and that the agent had no authority to reduce the price. The defendant signed his name in this subscription book but with the understanding mentioned. The publisher sued for $10 and the defendant tendered $4.27.

101. Cannon *v.* Henry, 78 Wis. 167; 47 N. W. Rep. 186

The defendants, who had a contract to do some railroad construction work, sublet their contract to various subcontractors. They employed McQuade as superintendent to see that the subcontractors carried out their work properly and kept a sufficient number of men at work to finish the job in time. McQuade arranged with the plaintiff to have him board certain laborers employed by the subcontractors and agreed that the defendant would pay the bill. Were the defendants liable? If so, on what theory?

102. Bank of Batavia *v.* N. Y. L. E. W. & R. Co., 106 N. Y. 195

Defendant's freight agent had authority to receive freight and issue bills of lading upon the actual receipt of shipments for transportation. Acting in collusion with W, he issued false bills of lading to W without having received any merchandise. W drew a draft on the fictitious consignee and had this discounted by plaintiff on the strength of the bill of lading. The bank seeks to hold the railroad company.

103. Benjamin *v.* Dockham, 134 Mass. 418

Plaintiff's declaration was for milk delivered to the defendant by the plaintiff at the defendant's request. The proof showed that the milk had in fact been delivered to the defendant's wife, who was separated from her husband because of his cruelty and was without means of support. Was this a variance between pleading and proof?

104. Terre Haute & Indianapolis R. R. Co. *v.* McMurray, 98 Ind. 358

Plaintiff in error appealed from judgment obtained by defendant in error for services as physician in attending a brakeman injured in an accident. Plaintiff was summoned by the conductor who was the highest employee of the railroad present. Did he have authority to engage the physician?

105. Power *v.* First National Bank, 6 Mont. 251; 12 Pac. Rep. 597

This action was brought to recover the amount of a bill of exchange which had been deposited by the plaintiff with the defendant bank for collection. The defendant, in the usual course of business, sent the bill of exchange to its correspondent. The correspondent collected the draft

but negligently failed to remit the proceeds and it subsequently went into the hands of a receiver.

106. People *v.* Taylor, 192 N. Y. 398

The Labor Law of New York State provides as follows:

"No child below the age of 14 years shall be employed, permitted or suffered to work in or in connection with any factory in this state. No child between the ages of 14 and 16 years shall be employed, permitted or suffered to work unless an employment certificate issued as provided in this article shall have been theretofore filed in the office of the employer at the place of employment of such child.

"Any person who violates or does not comply with [these provisions] is guilty of a misdemeanor."

A child under 16 years of age was found by a factory inspector working in the factory of which the defendant was superintendent, and who was charged with having violated these provisions of the Labor Law, as no employment certificate had been filed. The girl had been employed by the foreman and the defendant had never seen her and did not know that she was employed in the factory. Was the defendant guilty of any crime? Was the corporation operating the factory guilty of any crime?

107. Howard *v.* Daly, 61 N. Y. 362; 19 Am. Rep. 285

The plaintiff was engaged by the defendant to act in his theater for a certain definite term at a fixed salary. She reported at the beginning of the season for rehearsals but was not given any part or allowed to appear in the performances. She sued for the full amount of the salary for the entire term of the contract. What remedies were open to the plaintiff? Was it necessary for her, in order to recover, to report at the theater every day?

108. Martin *v.* New York Life Ins. Co., 148 N. Y. 117; 42 N. E. Rep. 416

The facts are thus stated in the opinion: "The plaintiff sued to recover salary at the rate of $10,000 a year from May 1, 1892, until January 1, 1893, with interest.

"The plaintiff entered the employ of the defendant in 1881 and was placed in charge of the real estate department at a salary of $5,000 a year. From the 1st of January, 1883, he received salary at the rate of $6,500 a year under an arrangement made in February, 1883. In February, 1884, his salary was increased to the rate of $10,000 a year, payable from January 1, 1884. His salary was paid monthly. Without further agreement of any kind, the plaintiff continued in the discharge of his duties until April 13, 1892, when he received a letter from the President of the defendant notifying him that his services would not be needed after April 30, 1892."

109. Weinberg *v.* Blum, 13 Daly (N. Y.) 399

The plaintiff made a contract with the defendants to act as salesman for them. He was to receive a certain commission on his sales and also to have the privilege of drawing $25 per week, which amount was to be deducted from his commissions. He sued for $25 for the last week of his employment. The defense was that he was not entitled to anything as the commissions earned during his employment were less than $25 per week.

110. Kalley *v.* Baker, 132 N. Y. 1; 29 N. E. Rep. 1091

The plaintiff, a broker, had been authorized by the defendant to find a purchaser for the defendant's farm, or one who would make an exchange. The plaintiff brought together the defendant and one Humphrey, and they made a written contract to exchange their properties, both to be free from incumbrances. Later it was found that Humphrey's title was defective and the defendant refused to carry out the contract on this ground. The plaintiff sued for his commission. Was he entitled to it?

111. Garfield *v.* Peerless Motor Car Co., 189 Mass. 395; 75 N. E. Rep. 695

The plaintiff was appointed an exclusive agent for certain territory by the defendant. The defendant itself made a sale to a person residing within the territory designated for the plaintiff. The company refused to pay the plaintiff a commission on this sale, whereupon the plaintiff sued for his commission. The defense was that the plaintiff was entitled to commission only on sales made by him. The plaintiff's theory was that he was entitled to commission on all sales made in his territory whether by him or by someone else.

112. Ludwig *v.* Gillespie, 105 N. Y. 653

This was an action for the price of merchandise sold and delivered by the plaintiff to the defendant. The contract read in part, "Sold for the account of E. Ludwig, Agent, to L. C. Gillespie, 4,000 cases Syrian Bitumen." The plaintiff was acting as agent for a French firm. Was the plaintiff entitled to sue or should suit have been brought in the name of the French firm?

Suppose the situation had been reversed and Ludwig had bought goods as agent for an unnamed French firm. In that case against whom could suit be brought?

113. Laing *v.* Butler, 37 Hun (N. Y.) 144; 15 N. E. Rep. 442

The defendant gave money to his agent to buy hides for him. The agent, without disclosing his agency, bought them from the plaintiff in his own name and on credit. The plaintiff, having found out that

the defendant was the real principal in the transaction, sued him for the price.

114. Kingsley *v.* Davis, 104 Mass. 178

Plaintiffs as brokers sold property, thinking they were acting for John J. Davis, whereas the property belonged to his wife. After finding this out, the plaintiffs sued John J. Davis and obtained a judgment, which could not be collected. Then they sued Mrs. Davis as the principal.

115. Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244; 60 N. E. Rep. 597

The defendant, who was the proprietor of a department store, advertised that it conducted a department of dentistry for the convenience of its patrons. This statement, however, was not true as the dentist who did the work was the real owner of the department and was not subject in any way to the control of the defendant. One of the customers of the defendant, not knowing about the real arrangement and thinking that the dentist was an employee of the defendant, had some dental work done. This work was done very negligently and unskilfully with the result that the customer was seriously injured. The customer brought suit against the defendant. Was the defendant liable?

116. Palmeri *v.* Manhattan Ry. Co., 133 N. Y. 261; 30 N. E. Rep. 1001

The plaintiff bought a ticket from the defendant's agent at the station and passed through the gate to take the train. The agent followed her, charged her with having given counterfeit money, and demanded another coin in place of the one given. She insisted that the coin tendered was genuine and refused to replace it with another. The agent called her a counterfeiter, placed his hand upon her person, and told her not to stir until he got a policeman. He detained her for a while on the platform, but not getting an officer, allowed her to go. She sued for false arrest.

117. McKeon *v.* Manze, 157 N. Y. Supp. 623

The defendant conducted a saloon and in connection with it a hotel or lodging house, the rooms of which were over the saloon. The defendant employed one Taft as lunchman, that is, Taft conducted what was known as a free lunch counter. Taft's work was over at 6 o'clock in the evening when the free lunches were discontinued, but sometimes Taft would stay around and help out the bartender. Taft lived at the place and had a room over the saloon. One evening Taft got into an altercation with a customer and threw a beer glass at the customer. Taft's aim was bad, however, and the glass hit another customer who had no part in the altercation. Was the defendant liable for the act of Taft?

118. Scott *v.* Rogers, 31 N. Y. 676

The plaintiff had 5,500 bushels of wheat stored with the defendant in Buffalo. On July 12 the plaintiff telegraphed the defendant to sell the wheat on that day at $1.08, or if not sold on that day to ship to New York. The defendant offered the wheat at that price to a prospective customer, who asked for an option until the next morning. The defendant, acting in good faith and thinking that it would do no harm if he gave the customer until the following morning, granted him the option. At 8 A.M. on July 13 the customer bought the wheat. The plaintiff, on learning the facts, repudiated the sale and sued the defendant for the conversion of the wheat. The plaintiff claimed that he was entitled to the highest market price prevailing in New York within the next four months.

119. Peoples Coat, Apron & Towel Supply Co. *v.* Light & Cohen 171 App. Div. (N. Y.) 671; affirmed 224 N. Y. 227

The facts are thus stated in the opinion: "Light was for some three years in plaintiff's service where, as driver of his wagon, delivering laundered coats and aprons to individuals and collecting payment for the use thereof, he acquired knowledge of and access to plaintiff's customers. Discharged by plaintiff on October 1, 1914, Light, after a brief interval entered the service of defendant, Cohen, who, by his inducement under the name of The Mutual Coat & Apron Supply Co., began a business similar to that of the plaintiff. Light, using his knowledge of plaintiff's customers acquired in his service, and by virtue of his former representation of plaintiff, went to them and induced them to substitute Cohen's outfittings for that of the plaintiff, and thereby secured their business for Cohen and deprived the plaintiff of it."

The plaintiff asked that the defendant be stopped from using the knowledge which Light had gained while in plaintiff's employment in depriving the plaintiff of its own customers.

120. Bain *v.* Brown, 56 N. Y. 285

The defendant was the agent of the plaintiff to sell realty belonging to the latter. The defendant made a contract to sell for $17,000. He informed the plaintiff of this. The next day some other parties applied to purchase the property. Thinking that he could make some money for himself, he gave these other parties a contract to sell for $26,000, naming himself as the vendor. For a consideration he secured an assignment of the first contract from the first purchaser. Then he induced the plaintiff to make a deed direct to the parties of the second contract on the representation that the purchaser under the first contract had assigned his contract to these parties. The defendant said nothing to the plaintiff about the second contract. The defendant received $26,000 on the second contract but gave the plaintiff only $17,000 and pocketed the profit of

$9,000. The plaintiff sued for the $9,000 made by the defendant in this manner.

121. Israelson *v.* Williams, 166 App. Div. (N. Y.) 25

The plaintiff employed the defendant, an insurance broker, to procure a policy and gave him full information in regard to certain other insurance on the property. The defendant secured a policy containing a clause that the policy should be void if there was other insurance on the property. The plaintiff accepted the policy without reading it, believing, of course, that the defendant had obtained a proper policy. After a loss, the insurance company successfully defended on the ground that the condition of the policy had not been met. The plaintiff now sues the defendant on the ground of negligence.

122. Kroeger *v.* Pitcairn, 101 Pa. St. 311; 47 Am. Rep. 718

The defendant was the agent for a fire insurance company. He stated to the plaintiff, who was a policyholder, that it would be all right for the plaintiff to keep petroleum on the premises in spite of the fact that this was forbidden by the terms of the policy. The defendant in fact had no right to make this statement, and when a loss occurred the company successfully defended on the ground that this condition of the policy had been violated. Was the defendant responsible to the plaintiff, as agent, for the loss caused by his misrepresentation? Why?

123. U. S. Telegraph Co. *v.* Gildersleeve, 29 Md. 232

Plaintiff in error appealed from a judgment obtained by the defendant for damages resulting from the erroneous transmission of a message sent by him as a broker. As a result of the error it was impossible for him to execute an order on which he would have earned commissions.

124. Parks *v.* Fogelman, 97 Minn. 157

Plaintiff, as agent purchased grain from the defendant and in doing so overpaid him the amount of $100 out of the funds of his principal. The question was whether the plaintiff could sue for the return of the overpayment.

125. Gundlach *v.* Fischer, 59 Ill. 172

The defendants were sureties on a bond given to insure the faithful performance of the duties of an agent under a contract. The agent's contract was to act as agent in selling certain machines. The agency contract did not contain any express provision as to duration, but it did contain a provision that the employer would furnish the agent such machines as he might be able to sell prior to October 1, 1867. After that date, but without the consent of the sureties, he continued to act as agent and mis-

appropriated some money collected by him after that date. Were the defendants as sureties liable for this misappropriation of funds?

126. Davol, Jr. *v.* Quimby, 11 Allen (Mass.) 208

This was an action to recover a debt. The defense was payment to the plaintiff's agent. The evidence showed that the plaintiff had authorized Howe to collect the debt from the defendant. Later the plaintiff engaged an attorney to make the collection. The attorney made a demand on the defendant but without securing payment. Afterwards the defendant paid the debt to Howe. The plaintiff never notified Howe that his authority had been withdrawn. Was plaintiff bound by the payment to Howe?

127. Gaynor *v.* Jonas, 104 App. Div. (N. Y.) 35

The plaintiff made a contract with the defendant whereby the defendant agreed to employ the plaintiff for three months at $16 a week. After one month the plaintiff was discharged because she had been sick and away from business for one and one-half days. She sued for her salary for the balance of the employment period, less what she actually earned during that time.

128. Hess *v.* Rau, 95 N. Y. 359

The plaintiffs who were brokers, had sold stocks short for a customer. In accordance with the usual custom among brokers, they had borrowed the stocks for delivery from other brokers and thereby had become obligated to return the borrowed stocks. The customer died while the transaction was still open. The defendant did not qualify as executrix until two months after his death. During this interval the plaintiffs "kept the transaction alive by borrowing stocks from time to time to replace the stocks previously borrowed which had been called for." A week after the executrix had qualified, they notified her to furnish additional margin and that in default of so doing, they would buy in the stocks on her account at a time and place named in the notice. The margin not being furnished, the plaintiffs bought in the stocks on that day at a loss on the transaction of $9,437.98. The defense claimed that the authority of the plaintiff's brokers ceased automatically on the death of Rau, and that therefore they had no right to continue the speculation after his death, but should within a reasonable time thereafter have bought in the stocks in order to close out the transaction.

PARTNERSHIPS

129. Meehan *v.* Valentine, 145 U. S. 611; 36 Law. Ed. 835

Perry loaned a partnership $10,000 for which the partnership gave him a promissory note payable with interest and agreed also to pay him one-tenth of the net yearly profits of the partnership business, if those

profits exceeded the sum loaned. After Perry's death, his executor, the defendant Valentine, was sued for some of the firm's debts.

130. Bush *v.* Beecher, 45 Mich. 188; 7 N. W. Rep. 785

Williams made a written agreement with Beecher, who owned a hotel, to hire the hotel from Beecher and to pay Beecher one-third of the gross profits. Bush sold some merchandise to Williams and afterwards endeavored to hold Beecher as a partner. Beecher had never been held out as a partner of Williams.

131. Fecheler *v.* Hand & Co., 133 Fed. 462

A firm and a corporation were in the same line of business operating in different places. They made a contract which provided that each should have the privilege of buying from the other at cost, such goods as it might select from the stock of the other and that each party should pay the other at the end of the year a certain percentage of the gross profits. The method of figuring gross profits was provided for in the contract. The question arose as to whether this agreement made them partners.

132. Harvey *v.* Childs and Potter, 28 Ohio St. 319

Harvey sued Childs and Potter for hogs sold by Harvey to Potter. The latter arranged with Childs to borrow a certain sum to buy hogs, agreeing to turn over the hogs to Childs, who was to sell them and have one-half the net profits of the transaction, and who was not to sustain any loss, as Potter agreed to reimburse Childs if the proceeds should be insufficient to cover his outlays. Childs advanced the money, but Potter, without the knowledge of Childs, purchased the hogs on credit from Harvey. Childs appealed from a judgment against him.

133. Hackett *v.* Stanley, 115 N. Y. 625; 22 N. E. Rep. 745

Stanley and Gorham made an agreement whereby Stanley loaned Gorham $750 "for use in the business of heating, ventilating, etc." and in consideration of this loan and in further consideration of the services of Stanley in securing sales, Gorham agreed to divide the net profits of the business equally with Stanley. The loan according to the agreement was "especially for use in the business and for no other use whatever." The loan was secured by certain collateral. The agreement further provided that Gorham was to be allowed $1,000 for his services in managing the business. The business was carried on in the name of Gorham. The plaintiff rendered services and furnished materials upon the request of Gorham in fitting up a place in New York for the carrying on of the business of heating, ventilating, etc. Was Stanley liable to the plaintiff?

Would your decision be affected by the question as to whether the plaintiff was informed of the agreement between Gorham and Stanley, or was ignorant of the same?

134. Phillips *v.* Phillips, 49 Ill. 437

John Phillips, a poor Scotch immigrant, founded a small business, which gradually grew to a large manufacturing establishment. His four sons worked with him and were largely responsible for the splendid growth of the business. Subsequently one of the sons withdrew from the business and filed a bill for an accounting as a partner.

The evidence showed the following: (1) that the business had been conducted in the name of John Phillips, the father, although in a few instances bills were made out to John Phillips and Sons; (2) that the sons devoted all their time and attention to the business and received no regular salaries but received funds for their support which were charged to them separately; (3) that the father told people that his sons were interested in the business and (4) that in accordance with the Scottish custom, it was understood that everything belonged to the father during his life and that the business and property would be left by him to his children on his death as he should think proper; and (5) that on repeated occasions he repudiated the suggestion of a partnership, saying on one occasion, "Na, Na, I will ha' nae sons for partners. Damn them. They would put me out of the door."

135. De Berkon *v.* Smith & Lewis, 1 Espingham Reports 29

Plaintiff, a merchant in Belgium received an order purporting to come from defendants Smith & Lewis as partners, although in reality Lewis was not a partner or concerned in the transaction. Plaintiff, not being acquainted with the defendants, made an inquiry of his London correspondent. He reported that he had discounted drafts for Smith and that Lewis had been introduced to him as Smith's partner. Upon receiving this report, plaintiff filled the order. Is Lewis liable?

136. Burnett *v.* Snyder, 81 N. Y. 550

Three men who were arranging to form a partnership desired to have the defendant, Snyder, join them, as he was a prominent man in the business in which the partnership was to engage. Snyder refused to become a partner, but made an agreement to share the profits and losses of one of the partners. This agreement was made with the knowledge and consent of the two other partners. Snyder took no active part in the management of the business. The question arose as to whether Snyder under these circumstances could be considered as a partner as to creditors.

137. Hendren *v.* Wing, 60 Ark. 561; 31 S. W. Rep. 149

Wing and two others constituted the firm of the Arkansas Machinery & Supply Co. The firm sold some machinery to Miller on credit and to secure the firm he gave back a chattel mortgage on the machinery. The

mortgage was made out in the name of the company. The machinery was obtained by Hendren, who had certain claims against Miller, but without the consent of the Arkansas Machinery & Supply Co. This firm sued to recover possession of the machinery, basing its claim upon the chattel mortgage. Hendren's defense was that the mortgage was void because it did not contain the name of any one of the partners.

138. Clements *v.* Jessup, 36 N. J. Equity 569

In a suit against Shea, a partner in the firm of Shea and Schnorr, Shea's interest in the firm was sold under an attachment and purchased by Clement, the plaintiff. Subsequently both Shea and Schnorr gave Jessup, the defendant, and a firm creditor, a chattel mortgage on firm property. Who is entitled to the chattels in question?

139. Whitcomb *v.* Converse et al., Supreme Judicial Court of Massachusetts (1875), 119 Mass. 38, 20 Am. Rep. 311

A bill in equity was filed by a partner in the dissolved firm of Converse, Whitcomb & Co., against the other partners, James C. Converse, Walter Stanton and Edward Blagden, to compel contribution for the losses incurred by the partnership. The partnership agreement provided for the carrying on of a dry goods commission business on the following terms: Whitcomb was to contribute $50,000 to the capital, and to receive 7% on the same and 25% of the net profits. Converse was to contribute $25,000 and to receive 7% interest on the same, and 25% of the net profits. Blagden and Stanton were each to contribute all their time to the business and each to receive 25% of the net profits. Whitcomb put in $25,000 of the $50,000 which he was to contribute. The partnership having been dissolved by mutual consent, a settlement of its affairs showed a loss of about $25,000. Blagden was insolvent and unable to pay any part of said loss. Stanton contended that he was not liable to make good any of the losses and, if liable, he was not liable to make good any part of the share which Blagden ought to have contributed.

140. Cashman *v.* Lawson, 73 App. Div. (N. Y.) 419; 67 N. E. Rep. 1081

Lawson, Welch & Quincy organized a partnership for conducting a hotel. Quincy actually carried on the work with the knowledge and acquiescence of the other members of the firm. He engaged the plaintiff as steward and obtained from him a deposit of $1,000 on the promise of returning it if the plaintiff would give thirty days' notice of his intention to give up the employment. Cashman did not know that Lawson and Welch were associated in the enterprise. After the death of Quincy, he found this out. Were Lawson and Welch responsible to the plaintiff for the return of the $1,000 deposit?

141. Burgan *v.* Lyell, 2 Mich. 102; 55 Am. Dec. 53

The plaintiff sued to recover for services rendered to a firm. He had been engaged by Harvie, one of the partners, without the knowledge and consent of the other partners. The other partners refused to pay on the ground that they knew nothing about the work and that the articles of copartnership forbade a single member from making a contract of this nature. The plaintiff did not know that there was any such restriction in the partnership agreement.

142. Freeman *v.* Abramson, 30 Misc. (N. Y.) 101

The plaintiff and one Meyer were in partnership as cigar dealers. Meyer without the knowledge and consent of his copartners made a bill of sale in the firm name by which instrument he conveyed all the stock-in-trade in the firm property to one Reische. Was this transfer valid?

143. Moore *v.* Williams et al., 26 Texas Civil Appeal 142; 62 S. W. Rep. 977

The plaintiff made a contract with the defendant, Williams, to build parts of a water works plant. Williams had the contract for the construction of the plant. Williams had two partners whose names, however, were not disclosed in connection with the work and everything was done in the name of Williams. He gave some notes in part payment for the plaintiff's services. The question arose as to who was liable on these notes—Williams alone, or Williams and the two secret partners.

144. Bank of Monongahela Valley *v.* Weston, 172 N. Y. 259

William W. Weston and his two brothers were partners under the name of Weston Bros. The other partners remained silent for many years while William made or indorsed numerous notes in the name of the firm that he used for his own purposes. This action was by the bank which held two such notes. On the trial one of the other partners testified that he had warned William to desist from this practice but that no public action had been taken for the protection of outside parties.

145. Kirk *v.* Hodgson et al., 3 John. Ch. (N. Y.) 400

Kirk and two others were partners engaged in business as booksellers. Hodgson, a clerk, stole some money belonging to the firm. Kirk insisted on discharging Hodgson but the other two partners agreed to forgive him and continue him in the employ of the firm. Kirk then brought this action suing Hodgson and his two partners, demanding that the partners be ordered by the court to discharge Hodgson from the employment of the firm.

146. Appeal of Jennings et al., 16 Atl. 19; 2 L. R. A. 43

Plaintiff sought a permanent injunction to restrain his four copartners from removing their steel works from Leechburg, Pa., the location stated in the partnership agreement for carrying on their steel manufacturing business.

147. Mitchell *v.* Reed, 61 N. Y. 123

Plaintiff and defendant had been partners in the business of conducting a hotel, on which they had a lease that terminated coincidentally with the partnership. They expended large sums in fitting up and furnishing the premises. By their joint management they built up a profitable business. More than two years before the expiration of the lease, the defendant procured a new lease in his own name and did not reveal this to the plaintiff. There was no evidence that the lessors would not have leased to the firm as readily as to the defendant.

Plaintiff asked to have the lease declared to have been taken for the partnership and to have it adjudged that the defendant held it as trustee for the partnership.

148. Metcalfe *v.* Bradshaw, 145 Ill. 125; 33 N. E. Rep. 1116

The plaintiff and the defendant formed a law partnership and agreed to give their time, skill, experience, and talents to the business of the firm. During the existence of the firm, the plaintiff had suggested that the defendant be named as an executor of the estate of a former client of the firm. The suggestion was carried out and the defendant attended to his duties as executor. After the dissolution of the firm, the plaintiff contended that the defendant must account for the fees received as executor on the ground that these be included as part of the firm income.

149. Linton *v.* Hurley, 14 Gray (Mass.) 191

The plaintiff sued Daniel and John Hurley, alleging that he sustained physical injuries while in their employ. Daniel and John Hurley were partners in the stevedoring business. The plaintiff's injuries occurred while engaged in unloading a vessel under the direction of one of the defendants. The other defendant was not present at the time of the accident. He contended that he was not liable because he was not in any way personally responsible for the accident.

150. Childers et al. *v.* Nealy, 47 W. Va. 70; 34 S. E. 828; 49 L. R. A. 468

Childers and Ramey filed a bill in equity against their copartner Nealy, praying for a dissolution of the partnership, a final accounting and the appointment of a receiver to wind up the business.

The proof showed that Nealy was violent and abusive, had threatened

the petitioners with violence and declared he would have nothing to do with them, that he would not contribute to expenses and that bills were unpaid and that because of the unsatisfactory condition of the business and "disagreements, dissensions and disaffections between the partners, the property and business were suffering."

The trial court refused to decree a dissolution, although it directed that Nealy be excluded from any participation in the business. Plaintiffs appealed.

151. Rische *v.* Rische, 101 S. W. Rep. 848

The parties were partners. The plaintiff asked for a dissolution on the ground that he had been excluded from participation in the management of the business and in the profits resulting therefrom. Were these sufficient ground for dissolution?

152. Johnston *v.* Fogg, 27 Ala. 432

Plaintiff petitioned for a dissolution of his partnership with defendant. It appeared on the trial that plaintiff was desirous of forming a partnership with a person competent to erect and conduct a saw mill on timber land owned by the plaintiff. The defendant represented himself as an experienced engineer and entirely competent for the work—representations that were entirely false. Relying upon these representations, plaintiff formed a partnership with the defendant.

153. Burchinell *v.* Koon, 8 Colo. App. 463; 46 Pac. Rep. 932

In this case, the surviving member of a partnership obtained a loan, to secure which he gave a mortgage on firm property. The proceeds of the loan were used to pay firm debts. Did the surviving partner have power to give this mortgage?

154. Johnston & Co. *v.* Dutton's Adms., 27 Ala. 245

Three partners conducted a sawmill. Two of them concurred in a firm note given for necessary supplies. The third partner Johnston gave public notice that he would not be responsible for any further debts contracted by the partnership and this notice was brought home to the supplier before the supplies were furnished.

155. In re Estes, 3 Fed. 134

Estes and Carter were partners. They went into bankruptcy both as partners and as individuals. The question arose as how the firm's property and the individual properties of Estes and Carter were to be apportioned among the various creditors, that is, among the firm creditors, the creditors of Estes, and the creditors of Carter.

CORPORATIONS

156. Trustees of Dartmouth College *v.* Woodward, 17 U. S. 518; 4 Law. Ed. 629

Dartmouth College received its charter from the British Crown in 1769. This charter was not dissolved by the Revolution. After the Revolution, the legislature of New Hampshire passed an act amending the charter of the college without the consent of the trustees. The question arose as to whether this act was constitutional, i.e., as to whether the legislature had the right to alter a charter once granted to an educational corporation.

Would your answer be the same if the corporation had been simply a commercial corporation?

157. State *v.* Carr, 10 N. E. Rep. 318

The question in this case was whether the State University of Indiana was a public or a private corporation. The university was established by a special act of the legislature. This act provided that certain public lands should be set aside for the university and that the proceeds of the sales of the lands should be put into the state treasury to be loaned out by the state auditor, and that the interest received from such loans should be applied to the current expenses of the university.

158. Beer Co. *v.* Mass., 96 Mass. 25; 97 U. S. 25; 246 Ed. 989

The Massachusetts legislature in 1809 incorporated the plaintiff company. Under the prohibitory liquor law of 1869, malt liquors of the plaintiff were seized while being transported for sale and forfeited. This amounted to a practical forfeiture of plaintiff's charter and plaintiff claimed it violated the U. S. Constitution.

159. Thomas *v.* Dakin, 22 Wendell (N. Y.) 9

This action was brought by Thomas as president of an association called the Bank of Central New York. Under the New York laws, suits by joint stock associations are brought in the name of the president. The defendant contended that the plaintiff in reality was a corporation. The bank was organized under a law which provided for banking associations. This law provided that such associations should have stock, that the stock should be transferable, and that stockholders should not be liable beyond the amount of their stock subscriptions. The law did not, however, use the word "corporation." Was the bank actually a corporation?

160. Hygeia Water Ice Co. *v.* N. Y. Hygeia Ice Co., 140 N. Y. 94

The plaintiff sought to restrain the defendant in the use of its corporate name on the ground that the resemblance would deceive the public. The plaintiff had been incorporated for $5,000 but only half of this had

been paid in and it had never engaged in business. The defendant had been incorporated one month later; its capital of $300,000 was paid; and it was regularly carrying on business. At the time of its organization, it had no knowledge of the plaintiff's existence.

161. Hall's Safe Co. *v.* Herring-Hall-Marvin Safe Co., 146 Fed. 37

Hall's Safe & Lock Co., a corporation, had been engaged for many years in manufacturing safes which were marked and known as "Hall's Safes," and had had a valuable good-will. The company sold its business, property, and good-will to the Herring-Hall-Marvin Safe Co. This sale was consented to by the three brothers of the Hall family who were officers and large stockholders in Hall's Safe & Lock Co. They signed the agreement of sale as officers of the company, but not as individuals. The Hall brothers organized another corporation under the name of "Hall Safe Co." The Herring-Hall-Marvin Co. petitioned for an injunction restraining the Hall brothers from carrying on the business of manufacturing safes under the name of "Hall Safe Co." or any other similar name.

162. Sturges *v.* Vanderbilt, 73 N. Y. 384

A judgment was obtained against the corporation after the expiration of the period named in the charter as the duration of the corporation. Was this judgment valid?

163. Ashley v. Ryan, 153 U. S. 436

Several railroad companies, each existing in a different state, sought to gain the powers and immunities of a corporation in Ohio. An Ohio statute imposed on a new consolidated corporation a percentage of the entire authorized stock as a filing fee. It was claimed that such a tax, being on interstate commerce, could not be levied by a state.

164. The Imperial Building Co. *v.* Chicago Open Board of Trade, 238 Ill. 100

The plaintiff sued the defendant on a lease. The defendant contended that the lease was unlawful, because the plaintiff was a corporation organized to hold real estate, which was forbidden by the law of Illinois. The plaintiff claims that it is at least a de facto corporation.

165. Nichol *v.* N. Y. & Erie R. R. Co., 12 N. Y. 121

This company was incorporated for only fifty years. It obtained a deed to certain property. A question arose as to the nature of its title to the property. Was it a title in fee simple or a limited title?

166. Matter of McGraw, 111 N. Y. 66

Cornell University was left a legacy of $1,150,000. The heirs at law objected on the ground that the University's charter limited its realty hold-

ings to $3,000,000 and that it already held that amount. The charter read: "the corporation hereby created may hold real property not exceeding three million dollars in value."

167. Slater Woolen Co. *v.* Lamb, 143 Mass. 420

The Slater Woolen Company sued Lamb for the price of groceries and dry goods sold to him. Lamb's defense was that the company having been incorporated "for the purpose of manufacturing" fabrics of wool and worsted could not maintain a store for the sale of groceries and dry goods.

168. Jemison *v.* Citizens Savings Bank, 122 N. Y. 135; 25 N. E. Rep. 264; 9 L. R. A. 708

The cashier of the defendant savings bank bought cotton for future delivery from Jemison, a member of the New York Cotton Exchange. He advised Jemison that the order was given by the bank for its customers whose names, however, he did not disclose. The speculation resulted in a loss and the bank, on being informed of this, refused to pay, stating that the cashier had no authority to engage in such a transaction. Is the bank liable?

169. Jones *v.* State of Mississippi, 101 U. S. 814; 25 Law. Ed. 1079

In 1867 the Mississippi legislature by a special act, incorporated the Mississippi Agricultural, Educational and Manufacturing Aid Society and gave it power to conduct lotteries. In 1870 the legislature passed an act making it unlawful to conduct a lottery in the state of Mississippi. The question arose as to whether this act of 1870 curtailed the power of the Aid Society in regard to conducting lotteries.

170. People ex rel. *v.* Pullman Palace Car Co., 175 Ill. 125; 51 N. E. Rep. 664

The Pullman Palace Car Co. was a corporation chartered to manufacture cars and also to purchase any real estate deemed necessary for the successful prosecution of its business. The corporation purchased real estate and built the town of Pullman with streets, sewers, water and lighting systems, dwellings, schools, churches, houses, stores, etc., for employees. The Attorney-General of Illinois brought a proceeding to forfeit the charter on the ground that the corporation had been guilty of usurpation of power.

171. Jacksonville M. P. & R. Navigation Co. *v.* Hooper, 160 U. S. 514; 40 Law. Ed. 515

In this case the question arose as to the liability of the railroad company for the lease of a hotel at the end of its line on a barren beach in Florida. Did the railroad have the power to make such a lease?

172. The Nassau Bank *v.* Jones, 95 N. Y. 115

The plaintiff bank made an agreement with Jones whereby he was to subscribe for certain railroad bonds and was to turn over to it one-half of the bonds allotted to him on his subscription. He did not turn over the bank's share, and the bank sued for half of the profits made by Jones on the transaction. The defense was that the contract was *ultra vires.*

173. Burral *v.* Bushwick R. R. Co., 75 N. Y. 211

The defendant issued the following certificate:

"BUSHWICK RAILROAD COMPANY

Tompkins Avenue Branch
Brooklyn, March 25, 1868

This certifies that Charles Foster is entitled to ten (10) shares of the capital stock of the Bushwick Railroad Company, upon surrender of this certificate at the company's office.

$1,000 F. W. KALBFLEISH,
President"

This certificate was transferred to the plaintiff who demanded that the defendant deliver to him the said "capital stock." This the defendant refused to do.

174. Flinn v. Bagley, 7 Fed. 785

The defendants were subscribers for the increased capital stock of a corporation. The subscription terms were that they were to receive the stock at 66 2-3 cents on the dollar. The subscriptions were paid and the certificates of stock issued. Subsequently the corporation went into bankruptcy. The trustee in bankruptcy sued the defendant subscribers for the remaining one-third of the par value of the stock. The trustee, of course, sued for the benefit of the creditors.

175. American Railway-Frog Co. *v.* Haven, 101 Mass. 398

The question involved was the right of one A. N. Clark to vote 300 shares of stock. Of the stock originally issued 400 shares were transferred by some of the stockholders to A. N. Clark "to hold for the benefit of the corporation." Clark claimed the right to vote this stock at corporate elections.

176. McNeill *v.* Tenth Ward National Bank, 46 N. Y. 325

The plaintiff delivered a certificate of stock to his broker to secure the broker for a balance owed him by the plaintiff. On the back of the certificate the plaintiff indorsed the blank assignment and power of attorney. The plaintiff owed the broker $3,000. The broker, without the knowledge

or consent of the plaintiff, pledged the certificate with a bank for a loan. When the plaintiff learned what had happened, he demanded that the bank deliver the certificate to him. This the bank refused to do unless it were paid $15,000, the amount of the broker's indebtedness for which it held the certificate as collateral. What were the rights of the plaintiff?

177. Lake Ontario Shore R. R. Co. *v.* Curtiss, 80 N. Y. 219

The defendant and other persons signed the following paper: "The undersigned, citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock, in and for the construction of, the Lake Ontario Shore Railroad, to the amount set opposite our names respectively, on condition said road is located and built through or north of the village of Unionville." The conditions were not fulfilled. The Lake Ontario Shore Railroad sued the defendant on his alleged subscription.

178. Hyatt v. Allen, 56 N. Y. 553

The plaintiff sold 20 shares of stock of a corporation to the defendant. The agreement of sale provided that all profits and dividends on the stock up to January 1, 1872, were to be paid to the plaintiff. The corporation did not declare any dividends until April 9, 1872, when it declared a dividend of $15 on each share. Two hundred and fifty dollars of this dividend was derived from an increase in the value of the assets of the company prior to January 1, 1872. Were the plaintiffs entitled to this portion of the dividend?

179. Stokes *v.* Continental Trust Co., 186 N. Y. 285

The plaintiff was a stockholder of the defendant corporation. A resolution of the stockholders was passed to double the amount of the capital stock. The plaintiff demanded the right to subscribe for a number of the new shares equal in amount to what he already held. This demand was refused. A resolution was then passed directing the sale of the new shares to certain bankers at $450 per share. The defendant voted against this proposition. He was not given an opportunity to buy the stock at $450 a share. The stock was increased and sold to the bankers at $450 although the market price at the time was $550 a share. The plaintiff sued for damages.

180. The Chicago City Ry. Co. *v.* Allerton, 85 U. S. 233; 21 Law. Ed. 902

The directors of the Chicago City Ry. Co., without calling a meeting of the stockholders, passed a resolution to increase the capital stock from $1,250,000, the amount limited in the charter, to $1,500,000. Did the directors have power to do this?

181. Bowditch *v.* Jackson Co., 76 N. H. 351

The plaintiff and other minority stockholders of the defendant corporation asked an injunction to prevent the sale of its assets to another corporation. They contended that the majority had no right to effect a dissolution by a sale of the entire corporate assets except by unanimous consent.

182. U. S. Steel Corp. *v.* Hodge, 64 N. J. 807

Hodge, a stockholder of the U. S. Steel Corporation sought an injunction to restrain it from carrying out resolutions of the stockholders providing for the retirement of $200,000,000 of preferred stock. The objection raised by Hodge was the fact that some directors of the corporation were also participants in the banking syndicate that was to finance the proposed stock reductions.

The circular letter accompanying the call for the stockholders meeting stated:

"To further the success of the plan there has been formed a syndicate, including some directors, which will receive four-fifths of the four per cent compensation to be paid under the contract with J. P. Morgan & Company, mentioned in the notice of stockholders' meeting."

The syndicate's contract with J. P. Morgan & Co. was approved by the stockholders by more than the two-thirds vote required by statute.

183. Hun *v.* Cary, 82 N. Y. 65

The defendants were trustees of a savings bank. For six years they conducted the bank at a loss. The average deposits were about $70,000. During the sixth year, the defendants, acting for the bank, purchased a lot, the cost of which was about $30,000 and erected a building at a cost of about $27,000. The object of the purchase of the building was to give the bank better facilities in the hope that this would mean an increase in its deposits. Two years later the bank failed. The real estate was swept away by a foreclosure of the mortgage placed upon it. At the time of the purchase of the property and the erection of the building, the bank was insolvent. Was this a case of a mistake in judgment on the part of the defendants or a case of recklessness and of gross carelessness?

184. Baldwin *v.* Canfield, 26 Minn. 43

The plaintiff brought suit for the cancellation of a corporate deed on the ground that the deed had been signed by the directors separately and without holding a meeting to authorize the sale of the property.

185. Donovan *v.* Purtell, 216 Ill. 627; 75 N. E. 334; 1 L. R. A. (N. S.) 176

Donovan, the appellant appealed from a judgment obtained by Purtell, appellee, in the court below. The appellant collected $1,200 belonging to the

appellee and kept the money, giving the appellee a note for $1,200 payable in three years with interest. The note was signed by the Fidelity Realty Co. by appellant as president and guaranteed in writing by the Donovan Real Estate Co. by appellant as president. The appellant controlled, managed and dominated both concerns. Neither company paid its debts but certain adjustments had been made by the appellant by the indiscriminate use of the properties of the two companies. The appellee's money was used by the appellant personally and not by either corporation.

The appellant's defense was that the liability was not his, but that of the corporations.

186. People *v.* Buffalo Stone & Cement Co., 131 N. Y. 140

The defendant omitted to make an annual report. Various stockholders, including some of the trustees whose duty it was to make the report, petitioned the attorney-general to start proceedings to annul the defendant's charter. He brought the proceedings in the name of the people without mentioning any complaint.

The failure to make the report was not due to any bad or corrupt motive.

NEGOTIABLE INSTRUMENTS

187. McNamara *v.* Hose, 28 Wash. 461

McNamara, the plaintiff, was the holder in due course of a note made by the defendant. McNamara had bought the note from a man named Daly. The defense of Hose, the maker, was that the note had been obtained from him by Daly in a fraudulent transaction. Was this a good defense as against McNamara?

188. Jump *v.* Sparling, 218 Mass. 324; 105 N. E. 878

This was an action against J. H. Sparling on the following promissory note:

"$596.20 Boston, Nov. 19th, 1908.

On demand after date we promise to pay to the order of David F. Burns five hundred and ninety-six 20/100 dollars. Payable at State Street Trust Co., Boston, Mass.

J. H. Sparling, Treas. Stratton Engine Co.
David F. Burns, Pres. Stratton Engine Co."

Oral evidence was received to the effect that both Burns and the defendant had signed the note in their respective capacities as officers of the Stratton Engine Company.

Was this legally the note of the defendant or of the Stratton Engine Company.

189. First Nat. Bank *v.* Lightner, 74 Kan. 738; 8 L. R. A. (N. S.) 231; 88 Pac. 59

The First National Bank of Hutchinson brought this action against George W. Lightner on the following instrument:

> "Hutchinson, Kansas, Aug. 10, 1903.
>
> G. W. Lightner, Offerle, Kansas—Dear Sir: Pay to the order of the First National Bank of Hutchinson, Kansas, on account of contract between you and the Snyder Planing Mill Co. $1,500.
>
> The Snyder Planing Mill Co.,
> Per J. F. Donnell, Treas.
>
> Accepted. G. W. Lightner."

Defendant contended that said order was non-negotiable, and was subject to the same defenses in the hands of the First National Bank of Hutchinson, Kan., as if it had remained in the hands of the Snyder Planing Mill Company.

190. Richardson *v.* Carpenter, 46 N. Y. 660

The instrument in this case was in part as follows: "Please pay A or order $500 for value received out of the proceeds of the claim against the Peabody Estate now in your hands for collection when the same shall have been collected by you." Was this a negotiable instrument? Why?

191. Dodge *v.* Emerson, 34 Me. 96

Suit was brought on a note "payable to the Protection Insurance Company or order for $271.25 with such additional premium as may arise on policy #50 issued at the Calais Agency." The question arose as to whether or not this was a negotiable instrument.

192. Coolidge *v.* Ruggles, 15 Mass. 387

The defendant signed a paper promising to pay a certain sum of money on the arrival of a certain ship in port. The question came up as to whether or not this instrument was negotiable.

193. Sackett *v.* Palmer, 25 Barb. (N. Y.) 179

This action was brought upon an instrument in the following words:

> "$550. Ninety days after the dissolution of the copartnership between Nelson Chapin, of the party of the first part, in said copartnership, and J. F. Palmer, of the party of the second part in said copartnership, and the settling of the books of the said firm, I, in behalf of the party of the second part, promise to pay to the said Nelson Chapin, of the party of the first part, five hundred and fifty dollars; the interest

to be paid annually by the aforesaid J. F. Palmer, of the party of the second part in the aforesaid copartnership.

(Signed) Nelson Palmer."

The question involved was whether the note was negotiable.

194. Seigel et al. *v.* Chicago Trust & Sav. Bank, 131 Ill. 569; 7 L. R. A. 537; 23 N. E. 417

The action was on the following instrument: "From B. Dalziel's Railway Advertising. $300. Chicago, March 5, 1887. On July 1st, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size — x — in one end of each of 159 street-cars of the North Chicago City Railway Co. for a term of three months from May 15, 1887. No. ———. Siegel, Cooper & Co."

This was endorsed by Dalziel to the Chicago Trust & Savings Bank, which sued Siegel, Cooper & Co., and obtained judgment. Siegel, Cooper & Co. appealed. The evidence showed that Dalziel had forfeited the right to use the cars before the time when the privilege of advertising was to commence. Siegel, Cooper & Co. insisting that the instrument is a simple contract only, sought to set up lack of consideration.

195. Shaffer v. Bond, 129 Md. 648; 99 Atl. 973

Defendant, sued by the payee of a promissory note, set up lack of consideration. The court charged the jury that "the burden of proof is on the defendant to show want of consideration." On appeal defendant claimed that this charge was erroneous, contending that upon the maker's raising the plea of no consideration, the burden of proof to show consideration shifted to the plaintiff.

196. Frank *v.* Wessels, 64 N. Y. 155

The plaintiff gave $400 to the defendant, and received a receipt or certificate of deposit, providing that "on return of this receipt," defendant was to repay the amount in "paper currency" with interest. The plaintiff sues to recover the money, but does not produce the certificate as it was stolen. It had not been indorsed by the plaintiff. The defendant demanded the dismissal of the complaint because the plaintiff had not offered to give any indemnity for the lost instrument.

197. Everston *v.* National Bank of Newport, 66 N. Y. 14; 23 Am. Rep. 9

"$35.00.

The Indianapolis, Wilmington & Western Railway Company will pay the bearer at its agency in the city of Newport, $35.00 in gold coin on the first day of April, 1871, for semi-annual interest on bond #..... Signed A. P. Lewis,

Secretary."

The above was a form of interest coupon on the bonds of the railroad company. Some of these coupons which had been detached from the bonds and sent on to Newport for collection were stolen, and the stolen coupons got into the hands of the plaintiff, Everston, who was a purchaser in good faith. Was he entitled to collect on the coupons?

198. Kellogg *v.* Douglas County Bank, 58 Kan. 43; 48 Pac. Rep. 586

This suit involved a note which had the following indorsement: "For value received, we hereby guarantee payment of the within note at maturity, waiving demand, protest, and notice of protest." The indorsement was signed by the payee of the note. On the trial the question arose as to whether or not this indorsement was sufficient to transfer the note from the payee to the third party. It was claimed that the indorsement amounted to nothing more than a guaranty.

199. Lloyd *v.* Sigourney, 5 Bingham (Eng. Rep.) 525

Sigourney was a Boston merchant. Lloyd was a London banker. Samuel Williams had an account with Lloyd. Williams was an American agent and as such received from Sigourney a bill of exchange from a London house which was indorsed by Sigourney as follows: "Pay to Samuel Williams of London or his order, for my use. Henry Sigourney." Williams indorsed this bill to Lloyd who discounted it and gave Williams credit for it in his account. Williams failed before remitting the proceeds to Sigourney and Sigourney brought suit against Lloyd for the amount of the bill.

200. First Nat. Bank of Shenandoah *v.* Kelgord, 91 Neb. 178; 135 N. W. 548

The question in this case was whether the plaintiff was a holder in due course of a certain promissory note. The note was payable to the order of "Wonder Stock Powder Company." It was indorsed in blank "James J. Doty, Prop." It was not shown whether the Wonder Stock Powder Company is a corporation of which Doty owns all the stock or whether it is a trade name used by Doty in his individual business.

201. Hunter *v.* Allen, 127 App. Div. (N. Y.) 572

The cashier of a bank received notes drawn to the order of one of the bank's customers. The notes were blank as to date, time of payment, and amount. He filled in the blanks and procured the indorsement of the payee and placed the proceeds to the payee's credit. In subsequent litigation the point arose as to whether or not the bank was a holder in due course.

202. Ward *v.* City Trust Co., 192 N. Y. 61

The president of a manufacturing corporation indorsed a check payable to the corporation with the corporate name signing his own name as

president, and delivered this check to a trust company in payment of a personal loan which he and another officer of the corporation had obtained. Later the corporation became insolvent and an action was brought to make the trust company refund the amount of the check to the corporation on the ground that it was not a holder in due course, inasmuch as it had notice from the nature of the transaction that the president had no right to negotiate the check to pay his own indebtedness.

203. Horan *v.* Mason, 141 App. Div. (N. Y.) 89

The defendant made promissory notes to the Horan-Marshall Co., Inc. These he refused to pay. The defense was that the notes were procured by fraud and that the holder of the notes being the president, was chargeable at least with constructive notice of the fraud. The evidence showed that the notes had been indorsed by the corporation to the plaintiff for full value, whereupon he had indorsed and discounted them at a bank. The bank paid him the full value for the notes and he subsequently paid the bank and took up the notes when the defendant failed to meet them. The bank clearly was a holder in due course. The plaintiff sued as a holder in due course and also as the successor to the rights of such a holder.

There was no evidence that the plaintiff had been a party to any fraud in connection with the notes.

204. Farmers National Bank *v.* Venner, 192 Mass. 531; 78 N. E. Rep. 540

The defendant made a note payable on demand to his own order. The defendant indorsed the note on the plaintiff's bank. The bank without making any demand for payment began suit. The defendant raised the point that the action was improper because no demand for payment had been made at the place specified in the note.

205. Challiss *v.* McCrum, 22 Kan. 157

Challiss loaned Ege $250 and took his note for $265. Challiss sold the note to McCrum, indorsing it "without recourse." McCrum sued Ege, but, as the note was usurious, recovered less than the face amount. McCrum sues Challiss for the deficiency. Challiss contends that he is not liable, as he indorsed "without recourse."

206. Springs et al., *v.* Hanover National Bank, 209 N. Y. 224

Plaintiffs as drawees paid defendant as indorsee from another bank a draft for $39,000. Forged bills of lading were attached to the draft and were indorsed over to plaintiffs. There was no reference in the draft to the bills of lading. The forgeries were not obvious and were not disclosed to the defendant until it had paid over the proceeds received from the plaintiffs to the indorsee in the ordinary course of business. Plaintiffs sue the defendant for the value of the shipments described in the bills of lading.

207. Guaranty Trust Co. *v.* Grotian, 114 Fed. 433

A bill of exchange drawn on Grotian was cashed by the Guaranty Trust Co. The bill contained the statement "charge to the account of 8,417.50 bushels of flaxseed." Grotian accepted it as follows: "Accepted, payable at Lloyd's Bank, London, against indorsed bills of lading for 8,417.50 bushels of flaxseed, per SS. Buffalo at New York." Grotian, who desired to obtain possession of the shipment without delay took up the bill of exchange from the Guaranty Trust Co. The bills of lading that were attached to the bill of exchange were subsequently discovered to be forgeries and Grotian sued the Guaranty Trust Co. for the return of the money paid.

208. Bergstrom *v.* Ritz Carlton Restaurant & Hotel Co., 171 App. Div. (N. Y.) 776

The plaintiff sued as assignee of Mrs. Bergstrom and of Bergstrom & Co., a firm of private bankers. Mrs. Bergstrom and her husband, who was one of the partners in the private banking firm, resided at Carlton House, an apartment hotel in New York. The defendant conducted the Ritz Carlton Hotel adjoining Carlton House. Mr. and Mrs. Bergstrom were known to the defendant. A check for $300 on the printed form of check of Bergstrom & Co., indorsed by one Freund, an employee of the Carlton House Co., and bearing the name of Mrs. Bergstrom as drawer and made out to the order of the defendant, was presented to the defendant's cashier by one of the employees of the Carlton House with the statement that Mrs. Bergstrom desired to have the check cashed. The check was cashed and was subsequently discovered to be a forgery. In the meantime the check had been paid by Bergstrom & Co.

209. State Bank *v.* Fearing, 33 Mass. 533; 28 Am. Dec. 265

The defendant took a note that was indorsed with the name of the payee. The defendant then indorsed it to the State Bank which discounted the note. When the note was presented to the maker, he refused to pay. The bank thereupon started to sue the defendant upon his indorsement. His defense was that he was not liable because the indorsement preceding his, that is, the indorsement of the payee, was a forgery.

210. Gilpin *v.* Savage, 201 N. Y. 167; 94 N. E. Rep. 656; 34 L.R.A. (N. S.) 417

This action was against the indorser of a note payable at a particular place which was the maker's residence. The cashier of the bank which held the note as security, telephoned the maker at his residence and stated that the note was held by the bank and that it was due. At the time of this talk, the cashier had the note in his possession. The note was never actually exhibited to the maker. The question arose as to whether or not this was a sufficient presentment to charge the indorser.

211. Cady *v.* Bradshaw, 116 N. Y. 188; 22 N. E. Rep. 371

The defendant, H. W. Bradshaw, was the indorser of a note made by E. W. Bradshaw to the order of R. Roland. The note was also indorsed by Mr. Roland. The facts which were relied upon to prove a waiver on the part of the indorser of demand and notice of non-payment were thus stated by the court:

"Prior to the date at which the note matured, this defendant called upon the plaintiff and asked if he would extend the note another year if the interest should be paid up. He said he wanted it extended another year and Ed (meaning the maker), would pay up the interest. The plaintiff responded that he was willing if the defendant would let his name be on it and let it be as it was. The plaintiff further asked the defendant if he and Mr. Roland would let their names remain on the note. And the defendant said "yes," if the plaintiff would let the note stand as it was. Before the maturity of the note, the plaintiff saw Roland who consented to the extension."

Do these facts show a waiver of presentment and notice of dishonor?

212. West River Bank *v.* Taylor, 34 N. Y. 128

This case involved a bill of exchange containing a number of indorsements. When the bill was dishonored, notice was sent to the last indorser, who in turn sent notice to his preceding indorser, and so on down the line. Ultimately the holder sued the first indorser who defended on the ground that he did not receive notice of dishonor from the holder, although of course he had received notice from his indorsee.

213. Bacigalupo *v.* Parrili, 112 N. Y. Supp. 1040

Plaintiff sued upon a check drawn by defendant and delivered by him to plaintiff on January 10, 1908. It was drawn on a private banker to whom plaintiff presented it the following day. The plaintiff was told that the banker was "kind of short of funds" and that he should call the following day. He did so and was informed that the banker had no money and could not pay the check. When the check was given to the plaintiff the defendant had a sufficient sum on deposit with the banker to pay the check.

214. National Reserve Bank *v.* Corn Exchange Bank, 171 App. Div. 195

Charles A. Stoneham & Co., a depositor with the plaintiff drew a check on the bank to the order of M for $8.12. M raised the check to $1,800.12 and in that condition it was certified by the plaintiff bank. M then opened an account with this check with the defendant and drew out the whole amount. The check was presented by the defendant to the plaintiff which paid it. Subsequently on discovering the forgery, the plaintiff sued the defendant.

The defendant defended on the ground (1) that the plaintiff was bound by its certification and (2) that the plaintiff had been negligent in not discovering forgery.

215. Sulsberger & Sons Co. *v.* Cramer, 170 App. Div. (N. Y.) 114

The defendant paid for merchandise with a check drawn on a local bank. The plaintiff did not put the check into his own bank for collection until five days afterwards. As the plaintiff's bank was in another town, the result was that there was a delay of nine days before the check reached the defendant's bank. On the day previous his bank had suspended. During all this period the defendant had sufficient funds in the bank to meet the check. Under the circumstances, the defendant claimed that he was released from liability.

216. First National Bank of Jersey City *v.* Leach, 52 N. Y. 350; 11 Am. Rep. 708

The defendant drew a check to his own order. He indorsed it to the plaintiff bank which had it certified by the defendant's bank. Later in the same day, when the check was presented for payment, payment was refused on the ground that the bank had suspended. Was the defendant liable on the check?

217. National Exchange Bank *v.* Lester, 194 N. Y. 461

The defendant indorsed a note. When he indorsed the note, it contained some spaces which made forgery easy. The defendant did not eliminate these spaces. Subsequently, a forger used these spaces to increase the amount of the note. The note was complete in form and contained no blanks. The bank which paid the note sued the defendant on the ground of negligence.

BAILMENTS AND CARRIERS

218. Norton *v.* Woodruff, 2 N. Y. 153

Action for breach of contract. Woodruff, a miller, agreed to "take" all the wheat Norton had in a certain storehouse and to "give" him 1 barrel of flour for every 4½ bushels of wheat. Woodruff was to pack the flour in barrels, to warrant it to pass inspection and to deliver it on certain days. After delivery of the wheat, the mill was destroyed by fire.

219. Westcott *v.* Thompson, 18 N. Y. 363

Westcott, a brewer, sold and delivered to a retailer 67 barrels of ale, the agreement being that the retailer was to retain the barrels until the ale had been drawn and "then the said barrels should be returned" to Westcott, the retailer to pay $2 for every barrel not returned.

The retailer sold the barrels to Thompson from whom Westcott seeks to recover them. Thompson contended that the sale to him was rightful on the ground that the arrangement between Westcott and the retailer was a conditional sale of the barrels the retailer having the right to return or purchase them.

220. Mack *v.* Snell, 151 N. Y. 193

Mack made a contract whereby he was to manufacture 1,000 pairs of shears for Snell. The rough castings for the handles were to be furnished by Snell and the blades by Mack. The question arose as to who was the owner of the shears.

221. Gibson *v.* Bessemer & L. E. R. Co., 226 Pa. 198, 27 L.R.A. (N. S.) 689

Gibson, keeper of a livery stable, hired a horse and buggy to Nicholas. While Nicholas was driving the horse and buggy were struck by one of the defendant's engines: the horse was killed and the buggy injured. The defendant was negligent because it did not give any warning of the approach of the engine but Nicholas was also negligent because he did not stop and look before driving on the track.

Has the plaintiff a claim against the defendant?

222. Krumsky *v.* Loeser et al., 37 Misc. (N. Y.) 504, 75 N. Y. Supp. 1012

The plaintiff, manufacturer of wrappers and defendants, proprietors of large department store, had never had business relations. Two swindlers, purporting to represent defendants, gave plaintiff an order with directions to deliver the goods to the defendants. Plaintiff did so, and as defendants received some 350 packages from various suppliers daily, this package was received without question. Later one of the swindlers or an agent of theirs took the package from the defendants with an explanation that it had been delivered by mistake. When it was found that the plaintiff and the defendants were the victims of a swindle, the plaintiff sued defendants upon the theory that they were gratuitous bailees and had been negligent in accepting the goods and delivering them to a stranger.

223. Wentworth *v.* Riggs, 79 Misc. (N. Y.) 400; reversed, 159 App. Div. (N. Y.) 899

Wentworth sued for the value of his overcoat stolen in the defendant's restaurant. Wentworth, a patron, hung his coat upon a hook that was a few feet from the table where he seated himself, but the cashier was accustomed to allow patrons to place satchels and similar articles behind the counter. There was no place for checking coats. The bills of fare and also placards on the wall carried the inscription "Not responsible for hats, overcoats, umbrellas, etc." Wentworth had not noticed this inscription

until his attention was called to it upon the discovery of the loss of his coat.

224. Vail *v.* Pacific R. R. Co., 63 Mo. 230

Vail sued for damages caused by the freezing of fruit trees shipped on the defendant's railroad. The trees were delivered to the railroad on a Friday to be shipped to a point 14 miles distant and the freight agent was requested to ship them the same day. Vail waited at the station to receive the shipment on Friday and again on Saturday until dark, but it did not arrive until late Saturday evening and was delivered on Monday. In the meantime the trees froze. The defendant disclaimed liability on the ground that the freezing was an act of God.

225. American Express Company *v.* Perkins, 42 Ill. 458

Perkins shipped a wreath partially made of glass by the American Express Company. Perkins did not disclose the contents of the package to the express agent. As the wreath was broken in transit, Perkins sued for damages.

226. Hart *v.* Penn R. R. Co., 112 U. S. 331

The defendant company transported five race horses belonging to the plaintiff. In the trip the horses were injured by the negligence of the employees of the defendant company. The extent of the injuries was $19,800. The defendant claimed that its liability was limited to $1,000, because of the following provision of the bill of lading: "the carrier assumes a liability on the stock to the extent of the following agreed valuation: if horses or mules, not exceeding $200 each."

227. Trowbridge *v.* Chapin, 23 Conn. 595

Plaintiff sued for the loss of two trunks placed on the defendant's steamboat. The porter who delivered the trunks found only one man on deck. This man was in bare feet and was washing the deck. The porter asked him where the trunks should be placed and he indicated a spot where the porter left them. The defendant claimed that this was not a proper delivery, as the man addressed by the porter was an ordinary hand and not authorized to receive baggage.

228. N. Y. C. & H. R. R. R. Co. *v.* General Electric Company, 219 N. Y. 227

Plaintiff sued for $618.53 for freight charges and defendant counterclaimed for $114,880.73 as an allowance for switching cars within its plant. Defendant had an extensive plant with twelve miles of railroad tracks and its own engines. Freight was loaded and unloaded at eighteen separate buildings. The freight rates included delivery at defendant's plant. Defendant insisted that plaintiff did not perform its contract of carriage by deliver-

ing cars to defendant's storage tracks but that it should have hauled them farther over an intricate system of interlacing tracks and distributed them among the various mills and warehouses.

INSURANCE

229. Indiana Ins. Co. *v.* Hartwell, 123 Ind. 177; 24 N. E. Rep. 100

Plaintiff applied to an insurance broker for some insurance. The broker secured the insurance through a firm of insurance agents who placed the risk with the defendant. The insurance agents had no authority to accept insurance for the defendant. They simply submitted applications to the defendant and received compensation for such applications as were accepted. In the plaintiff's application there was a misstatement as to the occupancy of the building, but the insurance agents knew the real facts in regard to the occupancy. Was this knowledge of the insurance agents binding on the defendant? That is, did they act in the matter as the agents of the plaintiff or as agents of the defendant?

230. Scammell *v.* China Mutual Insurance Co., 164 Mass. 341

The plaintiff on July 30, 1890, applied to the defendant for $3,000 immediate insurance on a vessel and the defendant marked the application "binding." The plaintiff at that time did not know the nature of the cargo or the destination of the voyage. The plaintiff was to ascertain this information and communicate it to the defendant so that the premium could be figured and a policy issued. On September 13, 1890, the plaintiff secured the information but he did not transmit it to the defendant and on February 11, 1891, he notified the defendant that the vessel was a total loss.

231. Foley *v.* Manufacturers & Builders Fire Ins. Co., 152 N. Y. 131

The question arose as to whether the plaintiffs had an insurable interest in certain buildings on their land and covered by their policy. At the time of the fire the buildings were incomplete; they were being erected under contract binding the contractor to furnish the materials and complete the buildings for a said sum to be paid on their completion.

232. Chisholm *v.* National Capital Life Ins. Co., 52 Mo. 213

The plaintiff took out a policy of life insurance on the life of her fiancé, and paid the first premium. Before the parties were married, the fiancé died. Did she have an insurable interest in his life?

233. Rawls *v.* American Mutual Life Ins. Co., 27 N. Y. 282

In this case a policy of life insurance was taken out by the plaintiff on the life of his creditor Fish. At the time of the medical examination

Fish answered truthfully the questions that were put to him in regard to his health and habits. He was not, however, asked any questions in regard to his use of intoxicants, although he was at the time a heavy drinker, and he did not volunteer any information about this. At the time of Fish's death the plaintiff's claim against him had become outlawed. The company contended that the plaintiff did not have an insurable interest in the life of Fish; that if the plaintiff did have an insurable interest at the inception of the policy, this interest lapsed when his debts became outlawed; and that the policy was void because Fish did not disclose the fact that he was a man of intemperate habits.

234. Lowenstein *v.* Fidelity & Casualty Co., 88 Fed. 474

This was an action on an accident policy issued by the defendant to E. Lowenstein, payable to his wife, the plaintiff, in case of death. The insured died from accidental asphyxiation caused by inhaling gas while asleep. The defendant company claimed it was not liable because the policy contained this provision: "This insurance does not cover injuries, fatal or otherwise, resulting from poison or anything accidentally taken, administered, absorbed or inhaled."

PERSONAL PROPERTY

235. Eibman *v.* War, 58 N. J. Law 445; 33 Atl. Rep. 958

The owner of certain land started to build a house on it. While the home was in the course of construction, he sold the property and agreed with the buyer that he would complete the house. He put in a portable furnace and a portable cooking stove. In subsequent litigation the question arose as to whether the furnace and the stove were part of the realty or simply personal property. The heater rested on a cemented floor, and its pipes ran into the chimney flues. The arrangement with respect to the range was similar.

236. New York Life Ins. Co. *v.* Allison, 107 Fed. 179

In this case the question arose as to whether certain dynamos and engines and electric light fixtures were to be considered as fixtures. The building in question had a system of pipes for lighting with gas, and was also equipped with an electric lighting system which could be connected with the street supply. Dynamos and engines were installed, however, so that the building could have its own electric lighting plant and thereby save money. These dynamos and engines were not especially adapted for this particular building and were easily removable. The electric lighting fixtures were also easily detachable and consisted principally of a switchboard, chandeliers, electric fan, and an electric sign.

237. Getchell *v.* Biddeford Savings Bank, 94 Me. 452; 47 Atl. Rep. 895

A man deposited his own money in a savings bank in his wife's name, and never delivered the bankbook to her. There was no evidence that the wife ever saw the bankbook or knew of the deposits. To whom did the money belong?

238. Starr *v.* Winegar, 3 Hun (N. Y.) 491

The defendant had mingled wheat belonging to the plaintiff with his own wheat. At the trial the plaintiff's attorney requested the court to charge that if the jury found the defendant had mingled his wheat with the plaintiff's, then the defendant must submit to any amount the jury might find. Was this a correct statement of law?

239. Parshall *v.* Eggert, 54 N. Y. 18

The plaintiffs discounted Roche's note. Roche was a commission merchant. To secure the plaintiffs, Roche gave them a receipt which stated that he had received certain grain in store for the account of the plaintiffs, subject to their order, and as security for his note; and he informed the plaintiffs that the grain mentioned in the receipt was in his broker's warehouse. Did the receipt and the statement constitute a valid pledge of the grain?

240. Susman *v.* Whyard, 149 N. Y. 127

The defendant, who was indebted to the plaintiff, applied to him for a further loan and offered to give a chattel mortgage. The plaintiff said he would not take a chattel mortgage but would take a bill of sale. The defendant gave the plaintiff a regular bill of sale, which, however, contained this statement: "It is agreed that if Whyard shall pay to Susman $400 within six months, Susman will resell the property mentioned back to Whyard. It is further agreed that the property is to remain in the possession of Whyard, who is to pay $2 a week rental for its use." $400 was the total indebtedness. The question arose as to whether this was really a bill of sale or a chattel mortgage.

REAL PROPERTY

241. Hoffman *v.* Armstrong, 48 N. Y. 201

Dr. Hoffman and the defendant were the owners of adjoining land separated by a fence. There was a cherry tree on Dr. Hoffman's land with branches overhanging the land of the defendant. The plaintiff, who was a sister of Dr. Hoffman and lived with him was standing on the fence

and picking cherries from the limbs overhanging the defendant's land when the defendant ordered her to stop. She refused and he resorted to force. She sued for assault and battery. The defendant claimed that the ownership of land includes everything above the surface.

242. Huntington *v.* Asher, 96 N. Y. 604

Hogan owned land on which there was a pond. He conveyed a small plot of land a short distance away from the pond to Asher. The deed contained a clause giving Asher and his heirs or assigns the exclusive right to take ice from the pond, with the privilege of access thereto for that purpose. Hogan later sold all the rest of the land to the plaintiff. Asher sold his lot to the defendant by a deed which contained no reference to the ice privilege. The defendant went upon the plaintiff's land and cut a large quantity of ice. The plaintiff then brought this action for trespassing.

243. Holbrook *v.* Finney, 4 Mass. 565

John Finney conveyed certain land to his four sons. The sons gave back to the father a purchase money mortgage, i.e., a mortgage in payment of the price. The plaintiff, who at that time was the wife of one of the sons, did not join in the mortgage. She subsequently brought this action to fix her dower interest in the land.

244. Hubbell *v.* Hendrickson, 175 N. Y. 175

The plaintiff sold and conveyed certain land to the defendant for $3,000 to be paid in annual instalments by the defendant in such amounts as she might be able to pay. The defendant mortgaged the property for $1,000. The proceeds of the mortgage she used to pay other debts. The plaintiff brought an action to have the court declare that he was entitled to a vendor's lien on the property. Was he entitled to such a lien? If so, was it superior or inferior to the mortgage?

245. Cooper *v.* Lawson, 139 Mich. 628; 103 N. W. Rep. 168

This was an action brought by a tenant against the landlord for loss to his property caused by a fire from a defective flue. In the lease the landlord did not assume any obligation to make repairs. The landlord did not retain any control over the chimney flue, and there was nothing to prevent the tenant from going on the roof of the building to clean the flue.

246. Pembroke Stationery Co. *v.* Rogers, 41 Utah, 411

Plaintiff, a tenant, sued the defendant, its landlord for damages caused to its goods by the overflowing of a bathtub on the floor above. It was not shown that the bathtub was defective.

247. Dewar *v.* Minneapolis Lodge No. 44, B. P. O. E., 155 Minn. 98, 32 A. L. R. 1012

Plaintiff a member of the Order of Elks, sued for alleged wrongful eviction from his room in the clubhouse of the Minneapolis lodge of the order. He claimed that he was a tenant entitled to the statutory notice of termination of tenancy and the defendant maintained that he was a mere "lodger."

SURETYSHIP

248. Strong *v.* Duffield, 144 N. Y. 392

The defendant's husband gave the plaintiff his demand note for a past due debt. The defendant indorsed the note when the plaintiff stated that he would not present it for collection. The plaintiff said: "I will hold it until such time as I want the money." The plaintiff made no demand for two years and then sued the defendant on her indorsement. She set up the defense of lack of consideration.

249. Cass *v.* Shewman, 16 N. Y. Supp. 236

In connection with a lease of his farm the plaintiff got from the defendant the following guaranty: "I hereby become surety for the fulfilment of the lease by the party of the second part, I hereby agreeing to fulfil all the terms and conditions of said lease not fulfilled by the party of the second part." On the tenant's failure to pay the rent the plaintiff sued the defendant. The defense was that no demand for the rent had been made on the tenant before the commencement of the suit and that the defendant had been given no notice of the tenant's default.

250. Kane *v.* Cortesy, 100 N. Y. 132

The plaintiff was the owner of a mortgage which was guaranteed by the defendant. When the time for the payment of the mortgage fell due, the plaintiff granted an extension of time to the mortgagor and the latter gave to the plaintiff a chattel mortgage on certain personal property as additional security. When the defendant was sued on the guarantee he claimed that the extension of time for paying the mortgage released him from his obligation under the guarantee.

251. Johnson *v.* Harvey, 84 N. Y. 363

Johnson and Allen went on the bond which was required of the defendant in a lawsuit. Before the trial Allen died, and a judgment was obtained against the defendant on which Johnson was compelled to pay $1,000. Johnson then brought suit against Allen's estate for $500.

252. Bellevue Building & Loan Co. v. Jeckel, 46 S. W. 482

Jeckel was the treasurer of the plaintiff corporation. He had been in its employ for some time. During the period of his employment he had been guilty of embezzlement. This was known to the plaintiff's directors. Without disclosing this fact, the plaintiff obtained from the defendant a surety bond for the faithful performance of his duties as treasurer. Afterwards Jeckel was again guilty of defalcation and suit was brought on the bond.

BANKRUPTCY

253. In re Luckhardt, 101 Fed. 807

A petition in bankruptcy was filed against Luckhardt by his creditors. Luckhardt had been a merchant, but shortly after committing the act of bankruptcy alleged became a farmer. He claims that he was not subject to an involuntary bankruptcy proceeding because he was a farmer by occupation.

254. In re Union Feather & Wool Co., 112 Fed. 774

The president of the Union Feather & Wool Co. from time to time made small advances of money to meet the pay-roll and the necessary expenditures of the corporation, and on each occasion he received a check from the company. He held these checks until the company had funds to meet them and then presented them and they were paid. At the time the checks were paid the company was insolvent. It was claimed in a bankruptcy proceeding that the paying of these checks constituted a preferential transfer, that is, the second act of bankruptcy.

255. Giehens v. Shiffler, 122 Fed. 505

A firm was charged with transferring property with intent to hinder, delay, and defraud creditors. It appeared that the alleged bankrupts had sold out their stock of goods at a fair value, about $1,165. They spent the proceeds of the sale as follows: $650 was used to pay a note on which the father of the partners was surety; $150 went for back rent; $100 was used for the support of their aged mother; and the balance, $265, was taken by the partners for their own support until they could get other work. There were a number of other creditors, none of whom were paid. Did any of these payments constitute fraudulent or preferential transfers?

256. In re Scott, 93 Fed. 418

In this case the petitioning creditors claimed that one of the claims presented should be disallowed. This claim was made by a former attorney for the bankrupt and all that was stated in the proof of claim as the consideration was the following: "That the consideration for said debt was

for legal services performed by said Scott during the year 1898." Is this a sufficient statement for a proof of claim?

257. In re H. J. Harrington Co., 113 Fed. 499

Out of a total of 89 creditors, representing 95 per cent of the amount of the claims, 86 accepted a proposed composition of 25 cents on the dollar. Only one creditor opposed the confirmation. The referee who investigated the matter, however, reported that it might be possible, although he was not certain, to realize 30 to 35 per cent on the debts if the bankruptcy proceedings were continued. The bankrupt was engaged in a country mercantile business and his assets consisted of accounts due, a stock of goods, real estate situated in the country, and estimated contracts for cutting and shipping wood. Do you think that the court should have approved the proposed composition?

258. In re All Star Feature Corporation, 231 Fed. 251

This case was based on a petition for priority for wages by Jane Cowl, the actress. She made a contract with the bankrupt company to act in a motion picture play called "The Garden of Lies." She was to receive $5,000 for a four weeks' engagement, beginning November 1, 1914, and was to give a fifth week if necessary. She also was to furnish her own costumes.

259. In re Great Western Mfg. Co., 152 Fed. 124

Six months before the bankruptcy petition was filed the debtor bought goods on credit, agreeing to give a mortgage on machinery as security. But the mortgage was not actually given until three months before the filing of the petition, and at that time the creditor knew that the debtor was insolvent.

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